COMPLETED
117
Y 4. J89/2: S. hrg. 99-452

S. HRG. 99-452

FALSE CLAIMS REFORM ACT

MF 130 ORIGINAL

HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1562

A BILL TO AMEND THE FALSE CLAIMS ACT, AND TITLE 18 OF THE UNITED STATES CODE REGARDING PENALTIES FOR FALSE CLAIMS, AND FOR OTHER PURPOSES

SEPTEMBER 17, 1985

Serial No. J-99-52

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
56-637 O WASHINGTON : 1986

I
BEST COPY AVAILABLE

SENATE COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania
MITCH McCONNELL, Kentucky

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

DENNIS W. SHEDD, *Chief Counsel and Staff Director*
DIANA L. WATERMAN, *General Counsel*
DEBORAH G. BERNSTEIN, *Chief Clerk*
MARK H. GITENSTEIN, *Minority Chief Counsel*

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

CHARLES E. GRASSLEY, Iowa, *Chairman*

ARLEN SPECTER, Pennsylvania
JOHN P. EAST, North Carolina

HOWARD M. METZENBAUM, Ohio
HOWELL HEFLIN, Alabama

ALICE R. MILDER, *Chief Counsel and Staff Director*

BEST COPY AVAILABLE

CONTENTS

STATEMENTS OF MEMBERS

	Page
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa	1
Metzenbaum, Hon. Howard M., a U.S. Senator from the State of Ohio	13
DeConcini, Hon. Dennis, a U.S. Senator from the State of Arizona	14, 15
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	21

PROPOSED LEGISLATION

S. 1562, a bill to amend the False Claims Act, and title 18 of the United States Code regarding penalties for false claims, and for other purposes 4

CHRONOLOGICAL LIST OF WITNESSES

Stephens, Jay B., Deputy Associate Attorney General, U.S. Department of Justice, accompanied by Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division 15
Gravitt, John Michael 49
Helmer, James B., Jr., Esq 53
Wityczak, Robert 80
Phillips, John R., Codirector, the Center for Law in the Public Interest 86
Silby, D. Wayne, chairman, the Calvert Fund, on behalf of the Business Executives for National Security, Inc., accompanied by Mike Burns, director of legislative liaison for BENS 104

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Gravitt, John Michael: Testimony 49
Helmer, James B., Jr.:
- Testimony 53
- Prepared statement 58
- Letter submitted, from W.G. Krall, to Paul D. Lynch, colonel, USAF, Air Force plant representative, General Electric Co., Cincinnati, OH, November 21, 1983 62
- Labor vouchers 63

Phillips, John R.:
- Testimony 86
- Prepared statement 89

Silby, D. Wayne:
- Testimony 104
- Prepared statement 106
- Defense contractors under investigation 109

Stephens Jay B.:
- Testimony 15
- Prepared statement 31

Wityczak, Robert: Testimony 80

APPENDIX

Heflin, Hon. Howell, statement on S. 1562, the False Claims Reform Act of 1985, September 17, 1985 113

BEST COPY AVAILABLE

FALSE CLAIMS REFORM ACT

TUESDAY, SEPTEMBER 17, 1985

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcomittee met, pursuant to notice, at 10 a.m., in room SD-628 of the Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Present: Senators Specter, East, Metzenbaum, DeConcini, and Heflin.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA, CHAIRMAN, SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

Senator GRASSLEY. I want to thank everybody for coming to this hearing. I appreciate the fine cooperation we have had from everybody who has consented to testify.

Congress has waged an eternal battle against defense contractor fraud and without a great deal of success. We all have our own favorite horror stories. Here is one I would like to quote:

> Persons have been employed to furnish shells for the use of the Army; and in several cases, it has turned out that these shells have been filled not with the proper explosive materials for use, but with sawdust.

This horror story was delivered on the floor of the U.S. Senate by Senator Jacob Howard of Michigan, on February 14, 1863:

> Just like undying truths that withstand the test of time, so too do we have undying profiteering that withstands even the mightiest rhetoric of this body and of the Justice Department.

Here is a little more of what was being said in the Senate 122 years ago regarding defense fraud against our Government:

Senator Wilson of Massachusetts said:

> Mr. President, these halls have rung with denunciation of frauds of contractors upon the Government of the United States. Investigating committees in both Houses of Congress have reported the grossest frauds upon the Government.

Then the aforementioned Senator Howard of Michigan said this:

> I believe that some frauds of a very gross character have already been practiced in the purchase and furnishing of small arms for the use of the Army. Arms have been supplied which, on examination and use, have turned out to be useless and valueless.

I continue the quote from Senator Howard of Michigan back in 1863:

BEST COPY AVAILABLE

It is desirable to enact some law which shall remove the stigma which rests upon the country and the Government in reference to the frauds, corruption and peculations which have disgraced our service. It is one of the crying evils of the period that our treasury has been plundered from day to day by a band of conspirators who are knotted together for the purpose of defrauding and plundering the Government.

Contractor fraud may well be the world's second oldest profession. Certainly after 122 years of experience with contract fraud in this country, the U.S. Government should have come to grips with how to solve this age-old problem.

Contract fraud was so rampant during the Civil War that it compelled lawmakers to pass practical and effective legislation that drew on our very own people at the grassroots. The 1863 law, later referred to as the Abe Lincoln law after its chief source of inspiration, called on private persons to bring Government cheaters to justice. This private right is aptly labeled "qui tam" which in the Latin phrase means "one who prosecutes a suit for the king as well as for himself."

Subsequent changes in the Lincoln law watered down its effect. Today, defense contract fraud is once again rampant as evidenced by the disclosure that nearly half of the Nation's 100 largest defense contractors are under investigation for fraud. It is enough to force Congress to pass practical and effective legislation once again. Minor fine tuning of the law will have only a minor effect. If we wish to deal effectively with rampant fraud, we must ask ourselves if the current system is institutionally capable of doing that. The evidence suggests it is not.

This hearing is going to focus on S. 1562, the False Claims Reform Act which I sponsored along with my colleagues Senator DeConcini and Senator Levin. I should also mention that the companion bill has been introduced in the House by Representative Andy Ireland. This legislation was introduced with two primary objectives: One, to provide our Government law enforcers all the tools necessary for effective policing against fraud and, second, to encourage private individuals to become actively involved in combating Government fraud. The False Claims Act is the Government's primary weapon against fraud, yet is in desperate need of reform. A review of current environment is sufficient proof that the Government needs help and, in fact, needs lots of help to adequately protect our Treasury.

The original False Claims Act is rooted in the realization that we cannot guard against Government fraud without the aid of private citizen informers. The Act allows citizens knowing of fraud to bring suit on behalf of the Government with the incentive of receiving a portion of the reward if successful. Unfortunately, when Congress amended the law in 1943 the act's incentive and utility for private citizens was removed.

We will hear testimony today from private citizen who have been benefited, and benefited the Government as well, under the language contained in S. 1652. These individuals, working for defense contractors, were directed by their very own employers to falsely bill the Treasury. When these individuals tried to expose the practices, they suddenly found themselves unemployed, without a job, out in the street.

BEST COPY AVAILABLE

S. 1562 also raises fines under the Civil False Claims Act from $2,000 to $10,000 per claim. The $2,000 amount has not increased since Abraham Lincoln signed the law in 1863. Additionally, this bill raises the amount of damages perpetrators must pay from double to triple. And in criminal false claims cases, the penalty will be $1 million. These increases not only heighten the financial risk for would-be cheater, but also demonstrate to them the Government is serious about stopping rampant fraud. Both treble damages and the $1 million criminal penalty have already been approved by both the House and the Senate as applied to defense-related false claims. Now, of course, S. 1562 extends these levels to all Government fraud as a matter of equity and consistency.

I would be first to say that one single piece of legislation will not and cannot be a cure-all for the Government fraud problem. However, reform is desperately needed not only in the content area of refining existing law but especially in the context area of rethinking our overall approach to fraud deterrence.

[The bill S. 1562 follows:]

BEST COPY AVAILABLE

II

99TH CONGRESS
1ST SESSION

S. 1562

To amend the False Claims Act, and title 18 of the United States Code regarding penalties for false claims, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 1 (legislative day, JULY 16), 1985

Mr. GRASSLEY (for himself, Mr. DECONCINI, and Mr. LEVIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the False Claims Act, and title 18 of the United States Code regarding penalties for false claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3729 of title 31, United States Code, is amended by—

(1) inserting "(a)" before "A person";

(2) striking out "$2,000" and inserting in lieu thereof "$10,000";

(3) striking out "2 times the amount of damages" and inserting in lieu thereof "3 times the amount of

BEST COPY AVAILABLE

damages in addition to the amount of the consequential damages"; and

(4) adding at the end thereof the following:

"(c) For purposes of this section, the terms 'knowing' and 'knowingly' mean the defendant—

"(1) had actual knowledge; or

"(2) had constructive knowledge in that the defendant acted in reckless disregard of the truth;

and no proof of intent to defraud or proof of any other element of a claim for fraud at common law is required.".

SEC. 2. Section 3730(b) of title 31, United States Code, is amended—

(1) in paragraph (1), by striking out the fourth sentence and inserting in lieu thereof "The action may be brought in the judicial district where the defendant, or in the case of multiple defendants, where any one defendant is found, resides, or transacts business, or where the violation allegedly occurred.";

(2) in paragraph (2), by striking out "if the Government—" through the end of the paragraph and inserting in lieu thereof "if the Government by the end of the 60-day period does not enter, or gives written notice to the court of intent not to enter the action.";

(3) in paragraph (3), by striking out "action is conducted only by the Government" and inserting in

BEST COPY AVAILABLE

lieu thereof "person bringing the action shall have a right to continue in the action as a full party on the person's own behalf"; and

(4) by striking out paragraph (4) and inserting in lieu thereof the following:

"(4) If the Government does not proceed with the action within the 60-day period after being notified, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date if the Government demonstrates to the court that it came into possession of new material evidence or information not known by the Government within the 60-day period after being notified of such action.

"(5) Unless the Government proceeds with the action within 60 days after being notified, the court shall dismiss the action brought by the person if the court finds that—

"(A) the action is based on specific evidence or specific information the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding; or

"(B) the action is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media.

BEST COPY AVAILABLE

If the Government has not initiated a civil action within six months after becoming aware of such evidence or information, or within such additional time as the court allows upon a showing of good cause, the court shall not dismiss the action brought by the person. The defendant must prove the facts warranting dismissal of such case.".

SEC. 3. Section 3730(c) of title 31, United States Code, is amended to read as follows:

"(c)(1) If the Government proceeds with the action within 60 days after being notified, and the person bringing the action has disclosed relevant evidence or information the Government did not have at the time the action was brought, such person shall receive at least 15 percent but no more than 20 percent of the proceeds of the action or settlement of the claim. Any such payment shall be paid out of such proceeds. If the person bringing the action substantially contributes to the prosecution of the action, such person shall receive at least 20 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses the court finds to have been necessarily incurred, in addition to reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

"(2) If the Government does not proceed with the action within 60 days after being notified, the person bringing the

BEST COPY AVAILABLE

action or settling the claim shall receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount shall not be less than 25 percent and no more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses the court finds to have been necessarily incurred, in addition to reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.".

SEC. 4. Section 3730 of title 31, United States Code, is amended by adding at the end thereof the following new subsections:

"(e) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of such employment by his employer in whole or in part because of the exercise by such employee on behalf of himself or others of any option afforded by this Act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this Act, shall be entitled to all relief necessary to make him whole. Such relief shall include reinstatement with full seniority rights, backpay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. In addition, the employer shall be liable to

BEST COPY AVAILABLE

such employee for twice the amount of back pay and special damages and, if appropriate under the circumstances, the court shall award punitive damages.

"(f) In any action brought under this section, or under section 3729, or 3731, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

"(g) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action brought by the United States pursuant to this section, or section 3729, or 3731.".

SEC. 5. (a) Paragraphs (A), (B), and (C) of Rule 6(e)(3) of the Federal Rules of Criminal Procedure are amended to read as follows:

"(A) Disclosure, otherwise prohibited by this rule, of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

BEST COPY AVAILABLE

"(i) any attorney for the government for use in the performance of such attorney's duty to enforce Federal criminal or civil law; and

"(ii) such government personnel (including personnel of a State or subdivision of a State) as are deemed necessary by an attorney for the government to assist such attorney in the performance of his duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize such grand jury material for any purpose other than assisting an attorney for the government in the performance of such attorney's duty to enforce Federal criminal or civil law. Such an attorney for the government shall promptly provide the district court, before which the grand jury whose material has been so disclosed was impaneled, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

"(C) Disclosure of matters occurring before the grand jury, otherwise prohibited by this rule, may also be made—

BEST COPY AVAILABLE

"(i) when directed to do so by a court, upon a showing of particularized need, preliminarily to or in connection with a judicial proceeding;

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

"(iii) when the disclosure is made by an attorney for the government to another Federal grand jury;

"(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law; or

"(v) when so directed by a court upon a showing of substantial need, to personnel of any department or agency of the United States and any committee of Congress (a) when such personnel are deemed necessary to provide assistance to an attorney for the government in the performance of such attorney's duty to enforce Federal civil law, or (b) for use in relation to any matter

BEST COPY AVAILABLE

within the jurisdiction of such department, agency, or congressional committee.".

(b) The first sentence of paragraph (D) of Rule 6(e)(3) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(D) A petition for disclosure pursuant to clause (i) or (v) of subsection (e)(3)(C) shall be filed in the district where the grand jury convened.".

SEC. 6. (a) Section 286 of title 18, United States Code, is amended by striking out "$10,000" and inserting in lieu thereof "$1,000,000".

(b) Section 287 of title 18, United States Code, is amended by striking out "$10,000, or imprisoned not more than five years" and inserting in lieu thereof "$1,000,000, or imprisoned for not more than ten years".

SEC. 7. This Act and the amendments made by this Act shall become effective upon the date of enactment.

O

BEST COPY AVAILABLE

Senator GRASSLEY. Now, before we go on to the panel, I would call upon my friend, Senator Howard Metzenbaum, the ranking minority member of this committee and the person who has spoken very forcefully in this area even before I came to the Senate.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Thank you, Mr. Chairman.

I want to thank you for doing as much as any single Member in the Congress in the past couple of years to bear down on the whole issue of waste and fraud in the Defense Department and the Government generally. I believe that this legislation—of which I am not a cosponsor at the moment but which I am publicly saying to you that I am prepared to become a cosponsor—will aid in this fight against waste and fraud.

Senator GRASSLEY. I will include your name before the day ends.

Senator METZENBAUM. I think you are providing yeoman leadership in this area. I am frank to say your efforts along this line and the concerns expressed at the judiciary meeting where you were present the other day are providing the kind of prod that the administration needs so that they may understand that those of us in Congress who have concern about this subject feel that justice should be meted out fairly and equally to all people and that we want more effective enforcement, not less.

I think that your bill is particularly good in that it provides for the right, first of all, for protection for the whistleblowers, and I think that is a particularly significant point. I think that the whistleblowers need protection by our Government and in too many instances the whistleblowers in defense industries have found themselves out on their ear and have not been able to retain their jobs. Instead of being rewarded for their efforts, they have been castigated by the employer.

Furthermore, the right of the private individual to bring an action as you provide for private lawsuits in this legislation, I think, is of great importance in every sense of the word. I think the administration ought to get behind both of those provisions.

In my opinion, nobody has taken more advantage of our Government than the defense contractors of this country. Parenthetically, these same corporations have failed to pay their fair share of the tax burden of this country. When you look at the list of those getting a free ride, you find the defense industries topping the list and, at the same time, they have padded their bills and labor charges as in the GTE case and, as in the GTE case, they have hired a consultant who has made available secret classified information having to do with electronic warfare systems, and what happens to them when they are caught? They get a slap on the wrist.

Now, the gentleman who is speaking today for the Justice Department and I had an opportunity to discuss this last evening on a TV program, and he talked about the fact that the courts are lenient. The fact is the courts are lenient in many cases because they are often presented with a plea bargain. It is the Justice Department that brings the matter before them on a plea-bargaining

BEST COPY AVAILABLE

basis, and the court really has very little alternative under those circumstances.

I think your legislation is strong. I think it provides for effective enforcement. I think it moves in the right direction. I would hope that the administration proposals in this area would see fit to incorporate in their proposals your proposals as well.

I would hope that other members on the other side of the aisle would see fit to join with you in cosponsorship of this legislation. I notice you have Senator Levin, Senator DeConcini, and myself. I think it is important and relevant that we need some who bear an "R" to their name as well as a "D" since we are an "R" administration. And I am hopeful that that will come about, but I certainly don't hold you responsible for that.

All in all, I commend you for what you have done in the past and indicate to you publicly that I am prepared to work with you in every way to move your legislation as promptly as possible.

Senator GRASSLEY. Thank you very much. I accept and will need very much that offer of assistance and know that you would be inclined in that direction anyway because of your pioneering in these areas and your willingness to take a stand on tough issues anyway.

I think before we go to the panel, I will wait until Senator DeConcini has finished visiting to call for an opening statement.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Thank you very much, Mr. Chairman, you are very kind.

I thank you for the invitation to join your subcommittee on the first day of hearings on S. 1562, the False Claims Act. I will ask that my full statement be put in the record, Mr. Chairman. I want to particularly point out your leadership in this area. Indeed, Senator Grassley has taken upon himself in some very difficult situations to point out some very stark examples of fraud being perpetrated upon the administration. Fraud upon the Government is wrong regardless of who is in the White House, in the Defense Department, or the Congress. I commend you for that courage, Senator Grassley, with which you pursue the issue of fraud against the Government.

I remember about 3½ years ago when we instituted the inspector general in the Department of Defense. At the time, the Secretary opposed it very, very strongly, said he didn't need any independent auditors. We overrode his opposition with bipartisan support and the inspector general has brought out some of the problems we have in that department.

It is important to me that we approach this in the manner that S. 1562 does by maintaining the tough provisions in it. What we want to do is update the False Claims Act and make it work. The sooner we pass this, the better. I am glad to be a cosponsor, Mr. Chairman, and you can count on my assistance in every way possible.

[Prepared statement follows:]

BEST COPY AVAILABLE

PREPARED STATEMENT OF SENATOR DECONCINI

Thank you, Mr. Chairman, for the invitation to join your subcommittee for this, the first day of hearings on S. 1562, the False Claims Reform Act. I commend your leadership in this area and look forward to working with you as this legislation is perfected and processed.

Several years ago, I became aware of the deficiencies in the False Claims Act and introduced legislation to bring the act into the twentieth century and increase the "bite" on those who make false claims against their Government. Hearings were held, a bill marked up by the full committee, and sent to the floor. It was at about this time that those interests against whose activities the bill was primarily aimed, finally utilized their clout and brought the bill to a screaming halt.

I don't believe it will be so easy to do that again. Over the past several years it seems like we have been treated to monthly scandals as we pick up the newspaper with our morning coffee. It has become ludicrous! Mr. Chairman, you have been particularly responsible for ferretting out some of the more egregious examples of fraud. The public and the Congress are aware of and darned mad about the repeated ripoffs of the Federal Treasury. This bill is going to pass in some fashion—I only hope we can keep the teeth in the bill.

The increase in penalties for filing false claims together with the modifications of the qui tam provisions make this a major piece of legislation with which to combat the growing incidences of fraud. I noted in the morning paper that the administration has also prepared a package of legislation addressed to generally the same areas as this bill. I hope to also support that bill and trust that the best portions of both of these bills can be processed as we work toward the common goal of repressing fraud.

Senator GRASSLEY. Let me thank you for the support you gave me last spring when I took on some of the same pioneering steps you took to solve this problem. And thank you for your continued cooperation.

Our first witness today is Mr. Jay B. Stephens, Associate Deputy Attorney General of the Department of Justice. Please proceed with a summary of your statement and, as is the practice of this committee, we will put your full statement in the record. Please introduce your associate as well.

STATEMENT OF HON. JAY B. STEPHENS, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY STUART E. SCHIFFER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Mr. STEPHENS. Thank you very much, Chairman Grassley. With me this morning is Stuart Schiffer, Deputy Assistant Attorney General of the Civil Division who has had a substantial amount of experience in dealing with false claims in the civil context. It is personal privilege for me to be here this morning. I know the chairman, indicated by both Senator Metzenbaum and Senator DeConcini, has done a pioneering effort in this defense procurement. This is an effort in which we share considerably the subcommittee's concern. You personally have been a pioneer in and have personally dedicated a lot of your time and efforts to try to solve some of the problems and issues that have arisen in the area of defense procurement.

It is also a pleasure to appear before Senator Metzenbaum. As he said, we had an opportunity to discuss these issues last evening. The issues in S. 1562 are all issues we all can focus on in good faith and try to come to a solution that will benefit the Nation. That is why I know you gentlemen are interested in that and why the Senate is focusing on that. I think you can count on working with

BEST COPY AVAILABLE

the Department of Justice to come to some practical solutions to try to get a better handle on this problem.

It is indeed a pleasure, as I indicated, to testify in this particular area. As you know, the President announced a Management Improvement Program on July 31. In that message, he outlined his concerns about fraud and waste and abuse in the Federal Government. As a major part of that program this administration as announced by the Attorney General yesterday has developed an eight-bill program devised to deal with the problem of fraud enforcement, particularly targeted at the defense procurement area. The eight bills which make up the Department of Justice package provide what we believe are important tools, long overdue weapons, to deal with the problem of fraud and bribery in connection with Federal programs and to recover Federal tax dollars from those who abuse our tax dollars. I know that is a concern of the members of this subcommittee, the waste of tax dollars that go out. The Defense budget area is an area we have to protect; this was alluded to in the opening statement of the chairman, and it is an area we must assure we are getting the maximum defense benefit for the amount spent. That is why I think the approach taken here by the subcommittee in focusing on S. 1562 is important. We have to assure we have a defense system that is not shot through with fraud, and that is what we hope to achieve, an objective to try to insure that type of program.

As I indicated, we have an eight-part program. Two of those parts are incorporated in S. 1562; that is the False Claims Act as well as some parts in the 6E area. The other parts of our package have been referred to other committees of the Senate and House. They include a number of other revisions which we believe will streamline the process in the defense industry for dealing with fraud against the Government in general. This includes a number of separate provisions—debt collection, moving resolution of claims to the Claims Court, and giving some additional authority to defense auditors so they could go after books and records to assure that they can supervise and monitor the contracts that come out of the Defense Department; also our antifraud package would provide for an administrative process to deal with claims submitted which do not involve massive contracts of over $100,000 by streamlining the administrative process to deal with false claims that may be submitted in that context.

Before proceeding to discuss specifically S. 1562, I would like to note, as we have indicated, we are really very strongly committed to attacking fraud and waste against the Government. That is one species of white-collar crime. We clearly need the reforms in S. 1562 as outlined more comprehensively in the other provisions announced by the Attorney General yesterday. Despite the landmark legislation enacted last year, these additional provisions there give us much needed tools, by clarifying the law in the area of procurement fraud and providing additional penalties and additional tools to deal with this problem.

We believe the tools outlined here will give us additional weapons to deal with this problem. As the chairman has so aptly pointed out, perhaps this is the second oldest profession. We are trying to deal with this issue, and we think with the cooperation of this

BEST COPY AVAILABLE

subcommittee and with the full resources of the Department of Justice, we intend to pursue this area vigorously. We will continue to do that, and we look forward to working with the committee to develop some new tools and methods of doing that.

Let me turn specifically to S. 1562 and address some of the provisions there. I would particularly like to compare them with some of the provisions we have outlined in the administration bill which was announced yesterday by the Attorney General.

The False Claims Act currently permits the United States to recover treble damages plus $2,000 for each false or fraudulent claim submitted to the Government for payment. As the chairman indicated, this was enacted back in 1863 in response to contractor fraud during the Civil War and it really has been an indispensable tool in dealing with procurement fraud.

Since the act was last amended in 1943, we have identified a number of areas which warrant some modification. Particularly, we have had some concerns about certain judicial interpretations of the act which have caused problems with the enforcement of that particular area.

S. 1562 contains many of the changes I indicated that we have suggested also, and I hope that after studying the bill that we could work together to come up with some ideas and that the Senate will adopt many of these changes which will provide assistance to the Department.

Perhaps the most significant amendments contained in S. 1562 of the False Claims Act go to the important civil provisions of that act. Those issues are really the standard of intent that must be established and the burden of proof.

This is a civil remedy. As a civil remedy, it is designed to make the Government whole for the losses it has suffered, and the law as it now is currently provides that the Government need only prove a defendant knowingly submitted a false claim.

The problem is this standard has been misconstrued by the courts from time to time to require that the Government prove that a defendant has actual knowledge of the fraud or even to go to establishing that the defendant had specific intent to submit a false claim.

I am sure all of you are familiar with the standards in civil and criminal process, and what this is basically imposing is a criminal penalty standard in a civil process. This is one of the areas that needs to be remedied under the False Claims Act. Both your bill, Senator, and the administration bill establish the intent which punishes defendants who knowingly submit false claims; knowingly is defined as a defendant who had actual knowledge or who had constructive knowledge in that the defendant acted in reckless disregard of the truth.

We believe this standard is well crafted to permit the Government to recover in frauds where responsible officials and corporations deliberately attempt to insulate themselves from false claims being submitted by lower level subordinates. This may occur in large corporations and the United States and the Department can face insurmountable difficulties in establishing corporate officers had actual knowledge of the fraud. We believe the change would help us substantially to deal with those who deliberately try to iso-

BEST COPY AVAILABLE

late themselves from the conduct but who we can demonstrate acted in reckless disregard of the knowledge and standard they should have known. We believe the standard which you have articulated in your bill, Senator, is acceptable to the department. We think in your consideration of it you may want to give some consideration to possibly refining it to assure that the standard which we outline in our bill, constructive knowledge, is defined as those situations where the defendant had reason to know the claim or statement was false or fictitious; this might possibly provide a better standard in dealing with litigation on this point and also give us a little more handle in dealing with some of the efforts of certain individuals and corporations who engaged in ostrich-like conduct.

In civil claims cases, we think legislative clarification is helpful and needed. Again, some courts have used the standard of clear and convincing evidence and have gone so far as to require unequivocal evidence of fraud. That is not the normal standard in most civil cases. These are civil remedies. We are not talking about criminal remedies.

We believe, as your legislation also points out, that a preponderance of the evidence is the appropriate standard to use in a civil fraud case. We think that standard can clarify where there has been some ambiguity and would be very help to the department in defining the burden of proof we have to make in these claims.

With regard to the nature of the punishment or the remedial amounts involved, we want to point out that the statute as drafted and as interpreted is really a remedial statute. It is not a punitive statute.

With regard to the amount of forfeiture involved, whether it is double damages or treble damages, the concern the Department of Justice has had in that area is that we have run across situations where judges have—where there is a disproportionate penalty—from time to time, they interpreted this as a more or less criminal type of statute and impose a higher burden of proof as well as a higher standard of intent.

We have no significant policy differences with regard to the penalties that the subcommittee is proposing in this legislation as to treble damage and the $10,000 figure, but we would like to point out our concern that we don't move into an area where the courts start interpreting this as a criminal statute and, as you move from double damages to treble damages, it could be interpreted as more punitive. When you move from the $2,000 to $10,000 forfeiture amount, it could be interpreted as a penalty rather than simply remedial to the Government. That is just an area we ask you to focus on to assure we don't create a problem for ourselves in the court.

Needless to say, we are pleased that the subcommittee and the Senator's bill will give us added tools in this area as proposed and these tools and things will be helpful.

There are a number of other areas I would like to summarize particularly in the false claims area that we believe there is room for development. We would like to work with the subcommittee to assure those provisions in the Senator's bill that we could work with and that by providing additional information we would be of assistance to you. Perhaps there are some you have not adopted

BEST COPY AVAILABLE

and perhaps you have been asked to give some consideration to a little broader scope in the area.

In the forfeiture area, you bill raises that to $10,000. I have expressed the concerns on that issue. That is something we ask you to focus on.

Second, the bill of the administration permits us to take actions against members of the Armed Forces. The original bill, the original act in the 1900's excluded the military because, at that time, the military had more significant sanctions available to it than we did on the civilian side. That is not necessarily the case today, and there is no reason for not including the military in that.

Third, our bill includes a provision to recover consequential damages. On this issue, I would just like to point out I think it is important that the consequential damages ought to be doubled, or if the subcommittee goes with the treble damages, they would perhaps be trebled. Under the current common law standards, we are permitted to recover single consequential damages in most cases. If we want to add an enhancement, the consequentials like the other remedial action should at least be doubled.

Fourth, our proposal provides where there are material misrepresentations by an individual or corporate officer to avoid paying money owed the Government that that material misrepresentation be treated very much as if the company or the individual had submitted a false claim. Because, indeed, if you are making a material misrepresentation on a claim or material submitted to the Government, you are putting yourself in the same shoes as if you submitted a false claim. We believe that conduct should be covered as well as the claim itself which may be falsified.

Senator GRASSLEY. Could I ask you to focus on the parts of our bill that the administration takes objection to.

Mr. STEPHENS. Senator, as I indicated, I think most of the provisions in your bill, and I have outlined two or three where we have some concerns as to standard of practice and how they would be implemented in the courts and how the courts would interpret them that might cause some problems. But, by and large, the provisions outlined in your bill are those which we find go a long way in dealing with this problem.

There are a couple of areas that do cause some concern, and there are a couple of areas I indicated that you may not have included; things such as in the civil investigative demand which we included in our bill which would give the attorneys in the Civil Division the ability to conduct a certain level of investigation in these areas and to provide a more effective enforcement effort.

Senator GRASSLEY. Would you focus on the qui tam provisions.

Mr. STEPHENS. That is one area where the Department has some concern about the way the subcommittee's bill is drafted and the senator's bill is drafted.

As you know, the False Claim Act since its inception contain provisions which permit informants to come forward with evidence of fraud on the Government, to file suit in their own name and then to keep a share of that recovery. As you indicated in your opening statement, these provisions were adopted at a time when the Government had practically no investigative resources. Unlike today, we have substantial investigative resources through the FBI and

BEST COPY AVAILABLE

the inspectors general, and we would hope to add civil investigative demands.

From time to time, we have found the qui tam provisions motivate an informer or someone who has been victimized to come forward with a meritorious claim that the Department can prosecute in the name of the United States. We have not proposed any changes in the qui tam provisions of the bill.

I would like to comment on those sections of your bill in terms of how this would operate in bringing cases and the extent to which there might be some confusion injected in the litigation procession.

In particular, one of the concerns we have is the portion of the bill which provides, that even after the Department of Justice has stepped in to litigate a qui tam action on the part of the United States, the person bringing the action can still have a right to continue in the case as a full party on the person's own behalf. If both the United States and qui tam individuals are in the case as a party it creates several problems. One, it creates the problem of who controls the litigation. If you have two parties operating in court on one type of claim, it creates some concern as to how do you manage that kind of litigation. Second, it creates a concern as to whether or not potentially there could be any collusive action if suits are brought by an associate of the defendant who brings a qui tam action, he may remain in the action to try to frustrate the litigation itself.

We think the object you are trying to get at in your bill has some substantial merit because you are trying to strengthen the qui tam provisions. We suggest perhaps you give some consideration at least to another manner in doing this. In particular, one idea would be language which would permit the relator to receive copies of pleadings and the relator would be allowed to file proposed views. This is analogous to the provisions of the current statute which permits dismissal of a qui tam action only by the Attorney General, files for a written consent with the court. What this would do is give the relator an opportunity to be heard in court, to be kept fully abreast of the litigation that is going on during the course of the case, and to be heard before the court with regard to his or her objections and on the proposed settlement the realtor would not serve as a parallel party in each step of the litigation as you go along because we think that would tend to create some confusion in the management of litigation.

Another problem or concern we have about the qui tam provision as now drafted is that it would permit a relator to bring an action based on evidence available to the Government and to proceed on that action where the Justice Department does not choose to enter a suit. The act as currently drafted forbids that. If there is information in the hands of the Government, the relator cannot move forward on his own hook and bring a case based on that evidence.

Initially, the way the act was drafted it permitted that to occur. Congress modified that in 1943 because they were concerned about the parasitic or bounty hunter types of suits in which an individual would come along and learn there was certain information in the hands of the Justice Department or Government and file individual suits to obtain, first, the amount of personal recovery, 20 percent for their own personal benefit. Congress moved to delete that sec-

BEST COPY AVAILABLE

tion in 1943, and we believe at that time exercised good judgment and wisdom in doing so. It has not been a problem we believe that needs to be corrected again. We think the current situation with regard to that kind of approach is appropriate.

As I indicated, the way S. 1562 is drafted, it would permit a relator to proceed with an action based on information known to the United States.

Senator GRASSLEY. Mr. Stephens, can I ask how much more time you need?

Mr. STEPHENS. At the convenience of the subcommittee——

Senator GRASSLEY. I would ask you to wind it up. Then I will proceed with my questions.

Mr. STEPHENS [continuing]. As I indicated, there are a number of reasons which we think regarding the qui tam provisions that the department itself may have information but may decide not at that particular moment in time to bring a case. There may be an ongoing criminal case. We may want to investigate more fully in a civil case. It may jeopardize another civil suit or it may give us an opportunity to bring a better case.

Apart from the qui tam, there are a number of other areas in the grand jury that the subcommittee may wish to focus on. We think that area as drafted by the Senator's bill basically conforms with our understanding with two exceptions. One exception is when we propose in our bill to provide the grand jury material to administrative agencies in the executive branch that that provision of grand jury material will be at the request of the attorney for the Government and that there be a substantial need showing. This is to protect the secrecy of the grand jury material and the integrity of the grand jury process. We have similar concerns as we expressed in our testimony with regard to congressional access to grand jury material.

I will conclude my opening remarks at that point, Senator. I am obviously happy to answer any questions you or any other members of the subcommittee have as we try to work through these problems with you.

Senator METZENBAUM. Just one question. The chairman has priority. Are you here supporting the Grassley, DeConcini, Metzenbaum bill, and I understand there have to be some changes, but are you generally supportive of the proposal?

Mr. STEPHENS. Yes; Senator, I think it is fair to say, and in my opening remarks I thought I indicated we thought both you and Senator Grassley had really staked out some territory here. We have been trying to prosecute and move forward in the procurement fraud area. We have some problems in S. 1562 with respect to qui tam and some of the other areas. We would like to work some modification of language but, in concept, I think we are pretty much together.

Senator GRASSLEY. I would recognize Senator Specter for an opening comment before I start my questions.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

BEST COPY AVAILABLE

I want to commend you and Senator DeConcini and Senator Metzenbaum for your concern in this area. It is an area obviously in need of much thorough analysis and action, and I believe that the private action to supplement governmental activity through the additional qui tam proceeding is a very promising approach.

Thank you very much, Mr. Chairman.

Senator GRASSLEY. Thank you. You attend this subcommittee frequently, and I appreciate the support you lend by being here and showing your interest.

I am going to split my questioning into two. We will go to Senator Metzenbaum, Senator DeConcini, and Senator Specter, and then I will move to my second round of questions.

Before I ask my first question which might fall into a hypothetical category, I would first of all like to suggest we are working together on a bill, and you have spoken of where there are little differences between your approach and our approach. I want to say to you that I appreciate that. I guess based upon what the administration has in their bill, I consider that a refinement of existing law, and that is perfectly legitimate.

What I am looking for in my legislation and the approach other cosponsors intend to take are to make some institutional changes more vigorous, because we feel that the situation is so bad out there that we need to make some changes.

I hope that, as you indicated in your statements, some progress is being made in going after defense procurement fraud as well as white collar crime in general. But there is something that has been pretty consistent throughout these hearings I have held in the last couple of years, and that is, whether it comes from the Department of Defense or from the Department of Justice, we always seem to hear mañana talk * * * things are going to get better. I think they are getting better, but I don't think we want to be lulled into a false feeling through happy talk about how our Government's resources are being used. I would like to assume those resources are fairly great and they are being used with utmost dispatch and efficiency.

I guess my position starts from the premise that even if they are, enormous resources, the government's resources are probably not enough. Hence, my suggestion of making it easier and to give more protection for private citizen involvement in this. That is the basic institutional change that I think should be made, plus Congress' greater involvement and access to information than before.

I would like to start my questioning with, as I suggested to you, a hypothetical and maybe take you back to your days of law school. Mr. X is an employee of a major Government contractor. His superiors have ordered him to falsify time cards and thereby overcharge the Government. Mr. X reports the call. The Government files a report. One year passes and the employee has not yet heard from the Government. Meanwhile, the mischarging practice continues at his company. At this point, if the employee sues the company under the False Claims Act, do you think the suit should be dismissed solely because the Government is already in possession of the allegations?

Mr. STEPHENS. Senator, the assumption in your hypothetical is that the Government has done nothing with the information that it

BEST COPY AVAILABLE

has received. Are you assuming they received the information and have not investigated?

Senator GRASSLEY. It is assuming they have not moved to the point that the private citizen probably would have moved. It is assuming that much.

Mr. STEPHENS. My response would be if that material were relayed to the Government and the Government investigated that allegation and determined there was a basis for it, perhaps there was a pending criminal matter pending; perhaps they acted within 1 year; perhaps in the initial assessment of it the Government determines indeed it is without merit; perhaps the Government is investigating or trying to collect more material to make it, indeed, a very visable kind of claim. I would suggest just because a year has passed that is not in and of itself a given right to the private litigant to come in and stand in the shoes of the Government without having these other areas or issues fully explored.

Senator GRASSLEY. You are saying the Government does always do something in these cases? That is implicit in your question or in your response?

Mr. STEPHENS. Implicit, I suppose, is if credible information is conveyed to the Government regarding a fraudulent transaction, misrepresentation, some kind of claim, I would certainly like to believe the Government would take some action whether through the inspector general of that particular agency or the FBI or perhaps as we suggested in our legislation through civil investigative demand. The Government should be given an opportunity to track down information. Not all allegations, as the Senator well knows, are meritorious, but those that are should have the resources of the Government focused on them. If they are, we should be able to bring them under qui tam, with the assistance and advice of the individual and with some recovery by that individual for bringing that information to the Government.

Senator GRASSLEY. I would like to take my hypothetical one step further.

Once the company becomes aware of Mr. X's disclosures, his performance evaluations are systematically downgraded, he is transferred to a different position. Eventually, the company informs him his services are no longer needed. Are there any remedies the courts could provide Mr. X and is there any compensation the Government could provided Mr. X in his efforts to save the Government money?

Mr. STEPHENS. Let me respond, and I will ask Mr. Schiffer to respond.

Finally, I would like to point out under the False Claims Act, I am not sure the false claims packet is designed to protect the employment status of an individual no matter how wronged that individual may have been by the company. It is designed to prosecute a claim of fraudulent conduct. There may be another remedy available or programs should be available. Perhaps Mr. Schiffer is aware of something there under the false claims. I don't think that is the purpose of the False Claims Act to protect employment status of persons who bring false claims to the Government.

BEST COPY AVAILABLE

Mr. SCHIFFER. This is a concern we have. I am aware of where U.S. attorneys have sought and obtained injunctive relief for individuals who have been cooperative with the Government.

Senator DECONCINI. Mr. Chairman, will you yield on that? That is solely at the discretion of the U.S. attorney. There is no right to that result.

Mr. SCHIFFER. I am not prepared to say whether he has a remedy or not.

Senator DECONCINI. What remedy would he have? Can you think of any?

Mr. SCHIFFER. It could be under one of those statutes or more likely he would need the assistance of a U.S. attorney's interference on the Government's investigation.

Senator DECONCINI. I think this act ought to take into consideration your hypothetical, because I think it is not all that much a hypothetical. It happens.

Senator METZENBAUM. It is not a hypothetical. There is a man sitting in this room. Our second witness is stymied. He is not getting help from the U.S. attorney's office or us and that is what this is all about.

Senator GRASSLEY. I thank you for contributing that point. I guess I would note that there is some uncertainty in your response which, if you did not anticipate the question, is perfectly legitimate. You said you thought there were a few cases or examples. I would like to have you submit in writing those examples or stand corrected that there are not any examples that you can give us.

Let me just say I don't believe this hypothetical case is unrealistic or that it is the worst-case scenario. Based on information we received from whistleblowers and would-be whistleblowers working for Government contractors, this hypothetical case illustrates a chain of events. We will hear from a few of these individuals in a few minutes.

One of the things I am particularly interested in hearing from them is how the current state of the law has protected private citizens who know of a fraud or participate in cheating the Government. It appears there is no incentive for reporting the violation. In fact, there is a powerful disincentive from coming forward.

Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

I have an article from the Baltimore Sun reporting of potential contract fraud uncovered by Pentagon auditors over the past 5 years, only 11 cases have led to prosecution according to a Defense Department document. Auditors have complained about reporting a fraud because of lack of prosecution. What good is it to increase current referrals, says Mr. Curry who is assistant inspector general. It goes on to say the administration is vigorously prosecuting contract fraud.

Now the Attorney General held a press conference yesterday and you come here today and say you are supportive. The facts don't bear up that the Defense Department has been aggressively fighting contract fraud. How do you answer that?

Mr. STEPHENS. I am not familiar with that particular article in the Baltimore Sun. The article suggests that in the last 2½ years there were 11 cases criminally prosecuted. I disagree with the

BEST COPY AVAILABLE

number of cases. I know there are more cases. I am not sure of the number of civil actions that have been brought, but since there are more than 11 criminal cases, I know there are more than 11 altogether.

I think it is fair to say over the last 3 years there has been forged a very healthy, good relationship in this area between prosecutors and defense auditors. Indeed, one of the provisions of our legislation is to beef up the auditors' ability to get books and records so they can audit and bring cases into the Department of Justice for prosecution. That is my sense; about this I know you may disagree with that, but this is a new area.

We have had the defense procurement fraudulent there for 3 years to serve as a catalyst to get the Defense Department to audit, to have a place where we can have cases referred, to act as a stimulus for U.S. attorneys to prosecute those kinds of cases. That relationship has improved substantially.

Senator METZENBAUM. How can you say it improved substantially. I am reading to you from a July 19, 1985 article in which the assistant inspector general is saying it is a waste of time to make further referrals and you say it has improved.

Mr. STEPHENS. Obviously, I disagree.

Senator METZENBAUM. You disagree, but here is an actual quote. Yours is an opinion. Here is a man from the Defense Department saying he can't get results from the Justice Department.

Mr. STEPHENS. It is his opinion in the newspaper article.

What I am suggesting is the cooperation has improved substantially. That is not to say there is not room for some further improvement or room for some increased cooperation, but I think it is fair to say if you go through the cases——

Senator METZENBAUM. Why don't you do this. Senator DeConcini suggests you give us your specifics. He says 11 cases of defense contract prosecutions.

Mr. STEPHENS [continuing]. We will be happy to submit for the record the number of cases that have been undertaken for investigation by the Department on the criminal side and civil side.

Senator METZENBAUM. I am asking for prosecutions.

Senator GRASSLEY. Let me interrupt here. We will have a hearing coming up on October 1 on Defense Department oversight.

Mr. STEPHENS. Perhaps that material can be provided.

Senator METZENBAUM. Doesn't the Department know there is strong need for protection for whistleblowers?

Mr. STEPHENS. I think whistleblowers need protection indeed. One, indeed, if they are blowing the whistle on fraud that contractors are engaging in. There are two points to that. One is the Government obviously needs protection. If the Treasury and Defense Establishment is being raided, it is important that individuals know those organizations and who have information that would suggest fraudulent conduct feel free to come to the auditors of those departments or agencies or the Department of Justice with that material. It is a second area of concern as to what happens to that individual within his organization for providing that information. I think those are two separate questions.

I don't think we disagree at all with regard to the need to get that kind of information. Indeed, many criminal prosecutions are

BEST COPY AVAILABLE

based on people coming forward. How you protect that individual is a question which you may want to address. I am not convinced that the False Claims Act is the way to do it.

Now, the whistleblower is protected through, basically, the civil rights statutes and civil rights kinds of actions showing discrimination.

Senator METZENBAUM. Can you give us some indication in the past 5 years or any other period you want to describe where whistleblowers have been protected by their Government in their effort to protect the Government from defense contractors?

Mr. STEPHENS. Cases in which a whistleblower has brought to an audit agency or the Department of Justice a Federal allegation of fraud and then has had some internal action—that is the type of thing you are asking for?

Senator METZENBAUM. Yes. I would eliminate credible. As soon as you put that word in, you throw out all cases.

Mr. STEPHENS. For harassment and vindictive purposes, it is not clear that an individual should be protected.

Senator METZENBAUM. The word may just be too strong.

Senator GRASSLEY. Mr. Stephens, since you said the Department was of the philosophy that whistleblowers ought to be protected, is there any chance you would be working with us then on that portion of our bill? We were of the impression that the Department objected to those portions of our bill.

Mr. STEPHENS. I think I have indicated in my prepared remarks as well as my oral testimony that we do have significant concerns with the qui tam provisions of your bill, Senator. That is one area; and the other area is grand jury access. I don't want to leave any misimpression; we have a concern about the impact of this legislation. That having been said, we want to work with you to try to come up with some remedy that would permit and encourage perhaps even this kind of information flow from individuals within the Defense Establishment to the Department or auditors; also, we need to look at the next step of what kinds of protection is out there for individuals who do that. I am not convinced at this time that those protections come under the False Claims Act. Perhaps an injunction brought by the Government where the Government is pursuing a case is one alternative. There may be another appropriate way to protect an individual who is being discriminated against for information he or she disclosed.

Senator GRASSLEY. With regard to Federal employees who are whistleblowers, I believe the Department of Justice has not offered any suggestion for changing or beefing up laws that protect whistleblowers. In fact, a bill I got through the Senate last year was killed in the last hour of the Congress in the House of Representatives because Bob McConnell, who was the congressional liaison for the Department of Justice, got it killed over there and he doesn't make any bones about how he got it killed.

Mr. STEPHENS. We may differ on the credibility issue of the allegation. There is another whole area here and that is to avoid harrassment of Senators, Congressmen, individuals in the private sector by individuals who are operating on other motives. I am not ascribing that to any particular cases.

BEST COPY AVAILABLE

Senator METZENBAUM. We people on this side of the table usually have the privilege of filibustering and not our witnesses.

Will the Department of Justice work with this committee to provide effective protection for whistleblowers in the private sector?

Mr. STEPHENS. Yes.

Senator METZENBAUM. Under the present law, a private suit is dismissed if the Government has information upon which the suit is based even if the Government does nothing. As I understood your original testimony, you still want that to be the law. You have to explain to me how that serves the public interest. Do you understand the point?

Mr. STEPHENS. I believe so, Senator. If I may restate it. Your concern is that the Department of Justice or the Government takes no action with regard to information provided it and even though we may take no action that the individual is precluded from taking action. You would like to change that.

Senator METZENBAUM. Right.

Mr. STEPHENS. Our concerns are several fold and Mr. Schiffer may wish to amplify on that because he has personal experience in dealing with this area of the law. We have the same concern in many respects that Congress addressed in 1943 when the bounty hunters or parasite suits were taken out. That is, any individual can read the press, can read reports and say there is some information about this that looks like an allegation of fraud and bring suit. You are probably immune from suit, but he may bring suit against any number of public officials or private citizens on actions which the agency in our Government, which is charged with the responsibility of making balanced judgments with regard to the credibility of information, has decided that perhaps there is not a credible case here; has decided that the case should be held in abeyance until a criminal case is completed; has decided for a good honest number of reasons that bringing suit may not be appropriate. It is generally our position it is inappropriate to permit another type of suit going on from the outside by an individual.

Mr. Schiffer may want to amplify on that.

Senator METZENBAUM. Before you answer, let me say the American people have lost confidence in their Government's willingness and ability to act effectively against defense contractors. Day after day, they read about cases that are washed under the rug, wiped out. GE is now OK, GTE is now OK, General Dynamics is OK, and they believe the Government is not on their side but they are on the side of the defense contractors.

Then you have a whistleblower who learns something, he wants to move, he does move to try to do something about it in the court. The Government goes in and says you can't do anything because we have that information, and under the provisions of present law, you can't move forward. One of the witnesses today will testify that is exactly what is happening to him in this very moment in his case. What is the Government's answer to that?

Mr. SCHIFFER. As Mr. Stephens indicated, we are quite proud of the record we have in both the criminal and civil area. Day after day the newspapers carry in small print prosecutions that have been brought and recoveries that have been obtained.

BEST COPY AVAILABLE

Senator METZENBAUM. A total of $4½ million in recovery from defense contractors.

Mr. SCHIFFER. Perhaps in an individual case but recoveries have certainly been well above that.

Senator METZENBAUM. How much?

Mr. SCHIFFER. I don't have exact figures, but I think I have heard $60 million.

Senator GRASSLEY. That is $4½ million and that is the defense procurement fraud unit setup, chartered solely to go after big defense contractors, not the locals.

Senator METZENBAUM. That is the figure I was referring to.

Mr. SCHIFFER. I was simply going to make the point we have no disagreement whatsoever that private citizens should and must be encouraged to come forward with information of this nature. If we have any disagreement, it is our belief there is ultimate responsibility somewhere, and we believe in this instance the somewhere is in the Department of Justice for investigating and finally making a prosecutive decision and to permit these suits to go on after matters have been prosecuted after determinations have been made there is simply no merit in our view does not serve the Department of Justice.

Senator METZENBAUM. Will the Justice Department work with this committee to help an individual go forward with his or her suit and at the same time protect the Government's concern and possibly that might be done by involving the district judge and discretionary decision that might have to be made or there might be some other alternative. Are you willing to work with us to alleviate that problem? And it is at the present time a major one.

Mr. STEPHENS. Senator, we are willing to work with the subcommittee. We have expressed what we believe are relatively institutional concerns about information being handled and prosecuted by the agency responsible for that. I am not sure the suggestion you have made is one that we would find acceptable, but we are willing to explore this area.

We have indicated that we have common objectives here in trying to cut down on the amount of fraud in the procurement area. We may have disagreements as to institutional relationship as to how that can or should be done, but we are willing to work and explore these areas. I don't want to leave you with the impression——

Senator METZENBAUM. If you have some suggestions, I would hope you would be in contact with the chairman promptly. We would be happy to have your help, but we don't want to drag it out. The session is rapidly coming to a close.

Senator GRASSLEY. Senator DeConcini.

Senator DECONCINI. Along the line the Senator from Ohio has pursued here, I would like to urge Mr. Stephens and his colleagues to submit to the subcommittee any constructive information you have and do so in a most expeditious manner. I think it is important we give serious consideration to that. I think your record is not so hot based on the information I have, and I don't pretend to have it all. I welcome information on how great you effort has been in going after contractors and how many millions you have saved and how many people you have prosecuted. I hope it is better than

BEST COPY AVAILABLE

what I read in the media which is not very encouraging from this Senator's point of view.

This bill is going to move, and probably the reason it is going to move, and rather rapidly, is the fact that the public has, indeed, lost confidence. I am well aware that publicity that is given to the obvious abuses make it difficult for prosecutors and investigators. I truly think it is important to try to set-aside past differences between DOS and the Congress. I certainly have my own feelings of the failure of the Justice Department to do more in this area, but we can't back. You can justify your actions and we welcome hearing about it. We are trying to put a strong bill together and your willingness to come and offer the technical changes and the logical reasons for those changes is very helpful.

If you will give us those ideas in writing, it will be very helpful to me. I just want to urge the chairman to expedite this bill.

I might say, Mr. Chairman, it is not easy to do this. I have defense contractors in my State, plenty of them, and several have had questions raised about their conduct. It causes problems when these things are brought to the public's attention, either by a whistleblower or prosecutor. I firmly believe, Mr. Chairman, neither we nor the administration have not met our obligation and responsibility to the public. I only hope we can work together in the spirit that has been offered here today.

Thank you, Mr. Chairman.

I will submit some questions, Mr. Chairman.

Senator GRASSLEY. You were asking if we were going to be able to expedite this and the answer to that is yes. That is why I want to be able to sit down with the Department of Justice if they want to put forward other information prior to our markup which should be shortly.

I would like to ask my questions on the second round just to clarify where DOJ stands on some things, and I would ask that you answer briefly because we have to move on.

Mr. Stephens, do you believe qui tam portions of the False Claims Act are useful or necessary?

Mr. STEPHENS. Yes.

Senator GRASSLEY. To what extent?

Mr. STEPHENS. We think it is helpful in bringing forth information to the institutions charged with the responsibility of investigating and prosecuting. Individuals have some incentive to bring that information forward and the recovery permitted personally does on occasion assist us in ferreting out and prosecuting fraud in the defense industry or in other types of Government programs.

Senator GRASSLEY. But it does not need to be changed to promote more use of it?

Mr. STEPHENS. That is correct. We believe as it currently stands it operates relatively effectively and we don't think any major changes are necessary. As I indicated earlier, we are willing to work with the subcommittee. If there are areas that you think are imperative to change so those areas of change do not impact negatively on litigation that occurs or do not create confusion in the system.

Senator GRASSLEY. Everything you said is based on the fact that the provisions are used very rarely today?

56-637 O—86——2

BEST COPY AVAILABLE

Mr. STEPHENS. I think qui tam is not the predominant source of information about procurement fraud. There are hundreds of auditors in these agencies which are charged with the responsibility of doing that. There are inspectors general, there is the Congress, there are FBI agents, and civil investigative demands. It is a small slice that in certain circumstances may bring forth information that needs to be brought forth and would not otherwise surface.

Senator GRASSLEY. I wanted to clarify that that was your position, and I thank you for doing that.

You would say the Justice Department is adequate and competent in enforcing laws in the area of Government fraud without the substantial aid of private qui tam litigants?

Mr. STEPHENS. I would say in the unusual circumstances, the qui tam litigant does not contribute to the major picture of the defense procurement fraud; but, occasionally in certain individual cases there are specific examples which there is a contribution. The provision is necessary because in specific kinds of cases information may not otherwise have surfaced. In the big picture, they don't contribute 20 percent or 30 percent to the overall enforcement effort. There is an escape there if the fraud is not turned up through normal investigative process.

Senator GRASSLEY. You do feel the Justice Department is doing its work along this line without any help through the qui tam process?

Mr. STEPHENS. We are doing our job. We always welcome information from others who have information to bring forth that would assist us on the civil side as well as the criminal side. We depend on our citizenry to have an honest defense establishment.

Senator GRASSLEY. I am curious. With regard to a general briefing within the Department of Justice for witnesses who come up here, are you instructed to testify that things are great and improving in a very general way? Was there any indication to you that that is the posture that you ought to take?

Mr. STEPHENS. No, Senator; I hope my testimony today reflects my views from my experience with the Department of Justice. I don't personally know every nook and cranny of what is going on there. We have able, talented, dedicated prosecutors and civil lawyers who have no motive not to do their best professional job. We have a terrific institution, and I am proud to serve there.

Senator GRASSLEY. It is not just the Department of Justice but also the Department of Defense. It seems like it is fairly standard policy for the happy talks I referred to previously. It seems like every Department of Justice witness paints a rosey picture, even though the evidence contradicts what they say.

I thank you very much for presenting the Department's point of view and look forward to working with you. Hopefully, we can reach some agreement not only where there is a refinement of the law but also where we suggest some basic changes in the law.

Mr. STEPHENS. Thank you very much, Senator. I appreciate the opportunity to appear.

[Statement follows:]

BEST COPY AVAILABLE

Prepared Statement of Jay B. Stephens

Mr. Chairman and Members of the Subcommittee --

It is a pleasure to appear today to discuss legislation that will strengthen our ability to attack fraud against the government. In a July 31 message to the Congress, President Reagan announced his Management Improvement Program to reduce fraud and waste, develop cash and credit management programs, and consolidate payroll, personnel and accounting systems. This message reflects the Administration's continuing commitment to reducing the cost of government while improving the timeliness and quality of goods and services being delivered to the American public.

A major part of the President's broad Management Improvement Program is directed at fraud in connection with government programs. This part of the Administration's initiative consists of an eight-bill Anti-Fraud Enforcement Initiative which the Attorney General announced yesterday morning. The eight bills which make up our anti-fraud legislatve package would give the Department of Justice important and, in some cases, long overdue weapons with which to deter fraud and bribery in connection with federal programs and to recover tax dollars from those who would abuse government programs to line their own pockets.

The components of our legislative package make up a comprehensive anti-fraud legislative agenda for consideration by the Congress and we look forward to working with you in the weeks ahead in an effort to secure enactment of these reforms by the 99th Congress. Of course, two of the principal components of our legislative package are incorporated in your bill, S. 1562, which closely tracks our own proposals for strengthening the False Claims Act and facilitating access to

BEST COPY AVAILABLE

grand jury materials. I will, of course, discuss these measures in detail in a moment.

The other six parts of our package, which are within the jurisdiction of other Subcommittees of the Senate, include the Program Fraud Civil Penalties Act, the Contract Disputes Act and Federal Courts Improvement Act Amendments, the Bribery and Gratuities Act, the Anti-Fraud Criminal Enforcement Act, the Federal Computer Systems Protection Act, and the Debt Collection Act Amendments. We are pleased to see that legislation substantially similar to our Program Fraud Civil Penalties Act is being processed by the Senate Committee on Governmental Affairs and that the computer crime issue is receiving attention in the House Judiciary Committee. With this hearing today, four of our proposals will at least have been the subject of congressional hearing.

Before proceeding to discuss S. 1562 and the two Administration proposals to which it is similar, let me note that we at the Department of Justice are strongly committed to attacking fraud against the government and other species of white-collar crime. We genuinely need these various reforms, however, if our investigative and enforcement efforts are to achieve the result we all want. Despite the landmark criminal justice reforms enacted last year in the Comprehensive Crime Control Act of 1984, we must have the help of the Congress in making further refinements in our laws relating to fraud.

We are proud of our record in the area of white-collar crime and are confident that the record will show more major white-collar crime prosecutions in recent months than for any comparable period in the last decade. The Department of Justice has an unrelenting commitment to pursuing white-collar crime, and we believe an objective and informed review of the record

BEST COPY AVAILABLE

will demonstrate that the dedicated and able prosecutors and investigators responsible for the large number of important and innovative prosecutions of recent months deserve accolades for their determination and imagination in attacking the frequently very complex patterns of such criminal conduct. The tools we have proposed in our Anti-Fraud Enforcement Initiative will provide genuine assistance in our common efforts to root out and punish fraudulent conduct.

Let me turn now to a discussion of S. 1562 and, where appropriate, to compare it with the corresponding provisions of our Anti-Fraud Enforcement package. The False Claims Act currently permits the United States to recover double damages plus $2000 for each false or fraudulent claim. Enacted in 1863 in response to cases of contractor fraud perpetrated on the Union Army during the Civil War, this statute has been indispensible in defending the federal treasury against unscrupulous contractors and grantees. Although the government may also pursue common-law contract remedies, the False Claims Act is a much more powerful tool in deterring and punishing fraud.

Since the Act was last amended in 1943, we have identified several areas where improvements are warranted, or where we believe judicial interpretations have been incorrect. S. 1562 contains many of the changes proposed by the Administration's bill, and I would hope that after studying the matter more thoroughly, the Subcommittee will adopt all of the much needed changes contained in our bill.

Perhaps the most significant amendments contained in S. 1562 and our False Claims Act Amendments are two which go to the heart of the civil enforcement provisions of the Act: the

BEST COPY AVAILABLE

standard of intent and the burden of proof. As a civil remedy designed to make the government whole for losses it has suffered, the law currently provides that the government need only prove that the defendant knowingly submitted a false claim. However, this standard has been misconstrued by some courts to require that the government prove that the defendant had actual knowledge of the fraud, and even to establish that the defendant had specific intent to submit the false claim. This standard is inappropriate in a civil remedy, and both our proposal and S. 1562 would clarify the law to remove this ambiguity.

Both bills also establish a standard of scienter, or intent, which punishes defendants who knowingly submit false claims. The key term "knowingly" is defined to punish a defendant who:

(1) had actual knowledge; or
(2) had constructive knowledge in that the defendant acted in reckless disregard of the truth;

This standard is well crafted to permit the government to recover for frauds where the responsible officers of a corporation deliberately attempt to insulate themselves from knowledge of false claims being submitted by lower-level subordinates. This ostrich-like conduct may occur in large corporations, and the United States can face insurmountable difficulties in attempting to establish that responsible corporate officers had actual knowledge of the fraud. This standard would not punish mistakes or incorrect claims submitted through mere negligence, but it does recognize that those doing business with the government have an obligation to ensure that the claims which they submit are accurate.

BEST COPY AVAILABLE

While this standard articulated in S. 1562 is acceptable -- and, in fact, is identical to that included in the False Claims Act Amendments of 1980 as reported from the Senate Judiciary Committee -- we feel that the language in the Administration bill would be a slight improvement and provide somewhat greater clarity. Our bill would define constructive knowledge as those situations where "the defendant had reason to know that the claim or statement was false or fictitious." We believe that this formulation is better crafted to address the problem of the ostrich-like refusal to learn of information which an official, in the exercise of prudent business judgment, had reason to know and would provide greater guidance in litigation of these issues.

The burden of proof in civil false claims cases is another area where legislative clarification is necessary to resolve ambiguities which have developed in the caselaw. Some courts have required that the United States prove a violation by clear and convincing, or even clear, unequivocal and convincing, evidence, United States v. Ueber, 299 F.2d 310 (6th Cir. 1962), which we have found to be the functional equivalent of a criminal standard. Because the False Claims Act is basically a civil, remedial statute, the traditional "preponderance of the evidence" standard of proof is appropriate.

With respect to both of these points, it is important to keep in mind that the civil, double-damage remedy of the False Claims Act is remedial, designed to permit the government to recover money improperly paid out, and not penal or punitive. This was long ago recognized by the Supreme Court which held that:

> ...the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole.

BEST COPY AVAILABLE

United States ex rel. Marcus v. Hess, 317 U.S. 537, 551-2 (1943). Single damages alone would not reimburse the government for its loss of the use of funds or costs of investigation and prosecution, nor would they serve the obvious deterrent purpose envisioned by Congress.

However, this crucial principle -- that a civil False Claims Act prosecution is remedial and not punitive -- may be jeopardized by proposals to increase greatly the penalties which may be recovered. We have found that where judges perceive the penalties which may be assessed under the Act to be grossly disproportionate to the wrongdoing, they will rule against the government outright or subtly engraft criminal standards and procedural hurdles onto the civil portions of the Act. Consequently, we are concerned about the proposal contained in S. 1562 to move to treble damages and a $10,000 forfeiture. Naturally, we are sympathetic to the desires of Congress to strengthen our hand in litigation and to increase recoveries under the Act. We believe, however, that double damages plus a $5,000-per-claim penalty is more appropriate and consistent with the fundamental purpose of the statute.

The Administration's bill contains numerous other amendments, some of which are also included in S. 1562, which were designed to resolve specific problems which have arisen under the Act:

- First, as noted above, the Administration's bill raises the fixed statutory penalty for submitting a false claim from $2,000 to $5,000. The $2,000 figure has remained unchanged since the initial enactment of the False Claims Act in 1863.

BEST COPY AVAILABLE

Second, our bill amends the Act to permit the United States to bring an action against a member of the armed forces, as well as against civilian employees. When the Act was first enacted in 1863, the military was excluded because the government had available more severe military remedies. Since then, however, experience has shown that the False Claims Act should be applied to servicemen who defraud the government -- just as it is to civilian employees.

Third, the Administration's bill contains an amendment to permit the government to recover any consequential damages it suffers from the submission of a false claim. For instance, where a contractor has sold the government defective ball bearings for use in military aircraft, the government could recover not only the cost of new ball bearings, but the much greater cost of replacing the defective ball bearings. See, United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972). S. 1562 contains a consequential damages provision, which we believe should be amended to permit the government to double the amount of the consequential damages. Without such a change, the provisions provide no enforcement enhancement because we currently can recover single consequential damages under common law contract theories.

Fourth, our proposal provides that an individual who makes a material misrepresentation to avoid paying money owed the government would be equally liable under the Act as if he had submitted a false claim. For instance, the manager of HUD-owned property may falsely understate income and overstate expenses in order to reduce the rental receipts which must be paid to HUD at the end of each month. This amendment would eliminate current ambiguity in

BEST COPY AVAILABLE

the caselaw by clearly authorizing the extension of liability to such misrepresentations.

Fifth, the Administration's bill would allow the federal government to sue under the False Claims Act to prosecute frauds perpetrated on certain grantees, states and other recipients of financial assistance. A recent decision, United States v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981), has created some confusion with respect to whether the federal government may recover in grant cases where the federal contribution is a fixed sum. There is no dispute that the federal government may bring a False Claims Act case where its grant obligation is open-ended, in that the fraud will require additional federal money. The amendment would make clear that the United States may bring an action even under grant programs involving a fixed sum.

Sixth, our bill creates a new, uniform remedy to permit the government to seek preliminary injunctive relief to bar a defendant from transferring or dissipating assets pending the completion of False Claims Act litigation. Currently, the government's prejudgment attachment remedies are governed by state law. A uniform federal standard would significantly enhance the government's remedies and avoid inconsistent results.

Seventh, the Administration's bill modernizes the jurisdiction and venue provisions of the False Claims Act to permit the government to bring suit not only in the district where the defendant is "found," (the current standard) but also where a violation "occurred". Currently, when multiple defendants live in different districts, the government may be required to bring multiple suits, a time-consuming process that is wasteful of judicial resources.

BEST COPY AVAILABLE

- Eighth, the bill modifies the statute of limitations to permit the government to bring an action within six years of when the false claim is submitted (the current standard) or within three years of when the government learned of a violation, whichever date is later. Because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure that the government's rights are not lost through a wrongdoer's successful deception.

- Finally, our bill provides that a nolo contendere plea in a criminal prosecution, like a guilty plea, would estop a defendant from denying liability in a civil suit involving the same transaction. Defendants who cheat the government by making false claims, and then enter a nolo plea, should not be able to relitigate the question for civil purposes.

Another important amendment -- contained in the Administration bill, but not in S. 1562 -- is the grant of Civil Investigative Demand, or CID, authority to the Civil Division to aid in the investigation of False Claims Act cases. As in all complex, white-collar fraud cases, investigative tools are critical to the success of a case. We currently rely in large part on FBI reports and matters referred for prosecution by the various Inspectors General. Our investigative capacity would be greatly aided if our attorneys could compel the production of documents or take depositions prior to filing suit. CID authority would permit us to focus our resources better as well as to winnow out those cases which have little merit.

The CID authority contained in section 105 of the Administration's bill is nearly identical to that available to the Antitrust Division under the Hart-Scott-Rodino Act of 1976,

BEST COPY AVAILABLE

15 U.S.C. 1311-1314. Briefly, where the Assistant Attorney General of the Civil Division believes that a person has access to information relating to a False Claims Act investigation, he may, prior to filing a complaint, require the production of documents, answers to interrogatories and oral testimony. The standards governing subpoenas and ordinary civil discovery would apply to protect against disclosure of privileged information. The CID would be enforced in district court, like any other subpoena.

In the only substantive difference from the Antitrust Division's authority, the Administration bill would permit the Civil Division to share CID information with any other federal agency for use in furtherance of that agency's statutory responsibilities. These might include enforcement of environmental and safety laws, banking regulatory laws and suspension and debarment actions.

The next point I will address, Mr. Chairman, is that of the citizen suit, or qui tam, provisions of S. 1562. The False Claims Act, since its inception, has contained provisions permitting informers to come forward with evidence of fraud on the government, file suit in their own name, and keep a share of any recovery. These provisions were adopted at a time when the government had practically no investigative resources -- unlike today, when the FBI and the Inspectors General generate most of our cases. .Nonetheless, the qui tam statute occasionally motivates an informer to come forward with a meritorious suit, which the Department can then prosecute in the name of the United States. Hence, we have not proposed any changes to the qui tam[1] provisions of the Act in our bill. S. 1562,

---

[1] Qui tam is from the Latin, meaning "who as well". Thus, when an informer files such an action, it is said that he brings the action "for the state as well as for himself," because he may be personally awarded a portion of the judgment granted to the government.

BEST COPY AVAILABLE

however, does propose a number of changes in the qui tam provisions of the Act, and we have serious reservations about those proposed changes.

Our first concern is with that portion of the bill which provides that even after the Justice Department has stepped in to litigate a qui tam action on behalf of the United States, "the person bringing the action shall have a right to continue in the action as a full party on the person's own behalf." Since both the United States and the relator (the person who brought the action) are pursuing the same claim, this presents a serious problem, i.e., who will control the litigation?[2] It also creates the potential for collusive litigation, since an associate of the defendant could bring a qui tam suit and then remain in the action to frustrate effective prosecution. If enacted, this provision could create enormous difficulties and seriously hamper our civil fraud enforcement efforts.

If Congress wants to permit the relator to remain involved in the action in order to protect his stake, this could be done in another manner which does not raise these problems. We would suggest that the relator be kept abreast of developments in the case by receiving copies of all court filings and that he be permitted to file with the Court his objections or views on any proposed settlement by the government. This is analogous to a provision in the current statute which only permits a qui tam action to be dismissed if the Court and the Attorney General give written consent and their reasons for consenting. 31

---

[2] We note that under the Federal Rules of Civil Procedure, unrelated parties may intervene in a lawsuit, (thus giving rise to litigation with several "parallel" plaintiffs) but each such "intervenor" represents a separate, distinct interest. We are aware of no precedent in which two parties represent the same, identical interest in the same suit.

BEST COPY AVAILABLE

U.S.C. § 3730(b)(1). Such a solution would provide an appropriate role for the relator without interfering with the Department's prosecution of the case.

Another serious problem is posed by the provision permitting a relator to bring an action based on evidence available to the government, and to proceed with the action even where the Justice Department chooses not to enter the suit. The Act currently forbids such "parasitic" actions by "bounty hunters" and, in fact, was amended by Congress in 1943 to address just this problem. In the early 1940's, a rash of suits were brought which merely restated the allegations in the government's criminal indictment in an effort to make a windfall. Such practices were criticized by Justice Jackson in U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 557-558 (1943) and moved the Attorney General to write to Congress proposing the deletion of the entire qui tam section. Congress responded by enacting the current prohibition on parasitic actions, codified at 31 U.S.C. § 3730(b)(4). See, United States v. Pittman, 151 F.2d 851, 853-54 (5th Cir. 1945) for a summary of the legislative history of the 1943 amendments.

S. 1562 would amend the Act by permitting the relator to proceed with an action based upon information known to the United States (including information disclosed in ongoing criminal or administrative proceedings as well as allegations arising out of congressional investigations and public information disseminated by any news media) if the Justice Department had not initiated any action within six months. The language of the amendment would seem to permit the government to move for an extension of time in which to decide whether to take over an action upon a showing of good cause, but this provision would be difficult to apply in practice. In effect, the civil frauds section of the Justice Department would have to be aware

BEST COPY AVAILABLE

of all allegations of fraud when they became public knowledge in order to protect the interests of the United States in such litigation.

There are several legitimate reasons why the Department might choose not to bring a civil action on the basis of information in its possession. There may be an ongoing criminal case or investigation which would be jeopardized by a civil suit. Or, by holding off and conducting a more detailed investigation, the government may be able to make a better case or bring in other defendants. Finally, the allegations may involve conduct which is not clearly improper, and hence, which the Department, in the exercise of its prosecutorial discretion, does not believe should be prosecuted.

It is this latter problem which is most troublesome. In recent years, we have seen a growing number of frivolous qui tam actions brought against public figures for political motives. Members of Congress, Executive Branch officials and even the President have been sued on the basis of publicly available information which raises questions about the expenditure of federal money.

Most such cases have been dismissed on the basis of the current statute which prohibits the courts from exercising jurisdiction over any action which is "based on evidence or information the Government had when the action was brought". 31 U.S.C. 3730. However, if this section is deleted from the Act, (as it would be under S. 1562) we can expect a significant increase in frivolous, politically-motivated lawsuits. In the absence of any evidence that the Justice Department is neglecting meritorious False Claims Act suits, we believe that such an open-ended expansion of private standing is entirely unjustified.

BEST COPY AVAILABLE

S. 1562 would also raise the relator's share in any recovery from the current maximum of 10% where the government takes the case and 25% where it does not, to 20% and 30% respectively. Obviously, any such recovery comes out of the federal treasury, but we do not believe that these percentages are unreasonable if Congress wishes to increase the incentive to utilize this Act. The bill also creates a new class of recovery for relators who can be said to have "substantially contributed to the prosecution of the action". Such persons would receive "at least 20% of the proceeds of the action". As an initial matter, we note that this provision, while providing an additional award to the more diligent relator, will inevitably result in litigation over whether a relator's actions "substantially contributed" to the government's success. We believe the prospects for such collateral litigation (not unlike that we see in the attorneys fees area) is not a productive use of resources, and believe that any additional marginal incentive such a "substantially contributed" category would provide is outweighed by the confusion and litigation it would generate. In any case, if the "substantially contributed" category is retained, there should be an upward limit on the amount of the relator's recovery, just as there is for the relator who prosecutes the entire action himself.

Finally, Mr. Chairman, I would like to turn to the sensitive and very important issue of grand jury access. S. 1562 adopts, almost without change, the Justice Department's proposal to modify Rule 6(e) of the Federal Rules of Criminal Procedure to permit attorneys enforcing federal civil law to have access to grand jury materials without having to make a showing of particularized need for the materials. This change would overrule two recent Supreme Court decisions, thus restoring the pre-1983 status quo.

BEST COPY AVAILABLE

On June 30, 1983, the Supreme Court ruled in United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983), that Department of Justice attorneys handling civil cases are not "attorneys for the government" for the purposes of Rule 6(e) of the Federal Rules of Criminal Procedure. Therefore, they may not obtain grand jury materials that pertain to their cases without a court order; and such an order may be granted only upon a showing of "particularized need". The Court further held that the "particularized need" standard was not satisfied by a showing that non-disclosure would cause lengthy delays in litigation or would require substantial duplication of effort.

In a companion case, United States v. Baggot, 103 S. Ct. 3164 (1983), the Court further limited federal law enforcement abilities by narrowly defining the purpose for which disclosures may be made. It held that agency proceedings, such as civil tax audits, are not "preliminary to a judicial proceeding," and thus, no court order may be secured in such cases, no matter how compelling the need.

Law enforcement efforts have been frustrated by the inability to share grand jury materials with Department of Justice civil attorneys or with agencies that contemplate using those materials in administrative or regulatory proceedings such as debarments, suspensions, and civil penalty assessments.

The impact of Sells and Baggot has been profound. First, the prosecutor is precluded from even advising civil Department of Justice attorneys or agency authorities of significant criminal activities which they should investigate, sometimes preventing meritorious civil cases from being pursued. Then, if the civil attorneys or agencies do learn of the allegations from non-grand jury sources, they must duplicate virtually the entire

BEST COPY AVAILABLE

criminal investigation -- an effort which may not be feasible or, at best, will cause substantial delays and require needless expenditure of effort, time and money. In one instance alone, Civil Division attorneys expended four man-years to completely reconstruct a complex, white-collar fraud case. While a precise "damage assessment" is impossible, it is believed that the United States has lost millions of dollars as a result of current restrictions on the ability to share grand jury information for civil enforcement purposes.

Accordingly, in its proposal, the Administration recommends amendments to Rule 6(e) designed to overcome the impediments caused by Sells and Baggot to the government's ability to pursue important non-criminal remedies. The amendments will (1) permit automatic disclosure of grand jury materials to Department of Justice attorneys for civil purposes without a court order; (2) expand the types of proceedings for which other Executive departments and agencies may gain court-authorized disclosure to include not only "judicial proceedings," but also other matters within their jurisdiction, such as adjudicative and administrative proceedings; and (3) reduce the "particularized need" standard for court-authorized disclosure to a lesser standard of "substantial need" in certain circumstances. The amendments also resolve another issue left unanswered by Sells: whether the same criminal prosecutor who conducted the grand jury investigation is authorized to present the companion civil case.

In two significant respects, S. 1562 differs from the grand jury access provisions of the Administration's bill. First, S. 1562, as drafted, permits disclosure to other agencies and departments without the disclosure being at the request of an attorney for the government, and even without notice to the Department of Justice. We believe that adequate control over secret grant jury material and prevention of even unintended

BEST COPY AVAILABLE

interference in an ongoing criminal investigation by another federal agency requires that such disclosures be accomplished only at the request of an attorney for the government or, at least, with the concurrence of the attorney for the government.

More significantly, S. 1562 provides for the disclosure of sensitive grand jury information to Congress without the concurrence of the prosecuting attorney; as drafted, the bill would even permit such disclosure in open, ongoing, criminal investigations. We believe congressional access raises significant constitutional issues and separation of powers concerns. Congressional access to grand jury materials during the course of an investigation opens the door for congressional intrusion into prosecutorial decisions entrusted by the Constitution exclusively to the Executive, while not assisting Congress materially in performing its oversight function. Within the Executive Branch, which is charged with enforcement of the laws, we believe it is permissible to provide for civil or administrative access to information developed during a grand jury investigation. But even within the Executive, we believe, as a matter of policy, it is very important to control access to grand jury materials, especially during an ongoing investigation, in order to protect the integrity of the criminal investigation process. In fact, if Congress enacts the Administration's proposed bill, the Department of Justice expects to issue policy guidelines applicable to disclosure within the Executive Branch, giving the criminal prosecutor responsibility for controlling disclosures to avoid interference in prosecutions and also to ensure that the grand jury process is not used as a substitute for civil discovery.

These concerns are magnified, of course, when considering access by Congress, which has no enforcement responsibility. We believe most Members of Congress are cognizant of the

BEST COPY AVAILABLE

constitutional problems, as well as the significant deleterious impact on the criminal investigative and prosecutive processes,posed by congressional access to grand jury investigative materials. Likewise, we believe the Congress's oversight function can be performed effectively by reviewing decisions after the prosecutor has had an opportunity to perform his constitutional function fully and finally. Any use by Congress of grand jury materials is for a very different purpose than that for which they were originally developed by the grand jury. The Congress seeks to determine the need for legislative modifications; the Executive uses grand jury materials to determine if an offense against the law has been committed and to penalize an individual perpetrator.

Currently, Rule 6(e) contains no express provision for congressional access to information that would reveal matters occurring before a grand jury, although some lower courts have held that there is indirect power in the courts to order such disclosure. We believe that the present situation, whereby requests by congressional committees for grand jury materials are accommodated on an ad hoc basis through discussions with the Department of Justice, has functioned well in protecting both the interest of congressional oversight and the integrity of federal investigations. Consequently, for this reason coupled with our fundamental concern about protecting the integrity of federal criminal investigations, we question the need for amending Rule 6(e) to deal with this issue.

Finally, with respect to the proposed increase in penalties for the false claims statute, 18 U.S.C. §§ 286 and 287, we agree that the increase in the maximum fine provisions to $1,000,000 is appropriate, but suggest that the maximum prison term should be parallel to the five-year penalty of other similar Title 18

BEST COPY AVAILABLE

statutes used frequently to prosecute conduct that also violates the false claims statute (cf. 18 U.S.C. §§ 1001, 1341, 1343). Indeed, in 1948, the penalty for the predecessor statute of 18 U.S.C. 287 was reduced from ten to five years to harmonize the punishment under that section with that of other comparable provisions of Title 18.

Once again, I would like to commend the Subcommittee for moving promptly to hold hearings and to consider this important legislation. We look forward to working with you on this. I would be happy to respond to any questions you may have.

Senator GRASSLEY I would like to explain to Mr. Phillips that as a courtesy to the witness we have from Cincinnati, OH, and also to my colleague who has been so helpful, I am going to call the panel foward at this time.

Mr. Robert Wityczak is a highly decorated Vietnam war veteran who became a triple amputee as a result of that war, is a former employee of Rockwell International at Downey, CA, and witnessed various billing violations at that plant.

We also have from the Evendale plant of the General Electric Co. there, Mr. John Gravitt. He is a machinist foreman. He also witnessed contract misinforming. With Mr. Gravitt is his attorney, Mr. James Helmer, who was able to provide us the practitioner's point of view of the workability of the False Claims Act. I would ask the Senator from Ohio his comments.

Senator METZENBAUM. I want to say to Mr. Phillips, and no personal offense to him, I certainly appreciate what he is trying to do.

Mr. Gravitt and Mr. Helmer are both from my State. I have to leave here in about 10 minutes because of another commitment. I think Mr. Gravitt's testimony is particularly important and I want to hear it in part and no offense to you either, Mr. Wityczak.

Senator GRASSLEY. I would ask you to wait. I would ask Mr. Gravitt to go ahead. Please be relaxed. You folks are contributing to this legislative process in a very important way. We are trying to reach a solution with citizen participation like yours as well as the Department's. It is a very important part of the legislative process. Please proceed.

STATEMENT OF JOHN MICHAEL GRAVITT, CINCINNATI, OH

Mr. GRAVITT. My name is John Michael Gravitt, and I reside at 6305 Orchard Lane, Cincinnati, OH 45213. I am 45 years old and am currently employed as a foreman by the Ford Motor Co. I am married and have two children. I am here today to talk to you about my experiences with the False Claims Act, including the law-

BEST COPY AVAILABLE

suit which I have brought alleging a multimillion dollar fraud scheme by General Electric Co.

Prior to my employment with Ford Motor Co., I was employed at the General Electric Co., Aircraft Engine Business Group, Evendale Plant, Interstate-75 and Neumann Way, Evendale, OH 45215, located in the suburbs of Cincinnati, OH. The Evendale General Electric plant employs about 15,000 employees. I worked for General Electric Co. from June 23, 1980, until June 30, 1983. I was first employed as a machinist, but was promoted to a machinist foreman in developmental manufacturing operations, then called DMO, later changed to component manufacturing operations.

As a machinist, I set up and operated various machine tools such as mills, lathes, jigbores, grinders, and other machine tools necessary to do my job. After my promotion, I supervised 18 to 30 machinists who worked with similar machine tools. I also supervised some inspectors, laborers, and toolmakers. As a supervisor, my job was to assign work to each employee, determine that time cards and vouchers were accurate and correct, and try to expedite work by making sure that the proper tools, fixtures, gauges, et cetera were available and in working order so that employees under my supervision were productively employed. Vouchers were used by General Electric to charge the work performed by each employee to the proper account or customer. In my area of the plant, we worked on both commercial and U.S. Government defense contracts. In particular, we worked on parts for the engines for the B-1B bomber, an energy efficient engine for the National Aeronautics and Space Administration known as E3, the nozzle section of the F-404 aircraft engine, and other U.S. Government contracts.

It took me considerable time to learn the coding system so that I knew which work was Federal Government defense contract work and which work was similar work, but being performed for private, commercial accounts. I eventually learned which was which because I was instructed to alter and falsify vouchers by my supervisors. I was instructed, along with at least one other foreman and probably others, to alter the hourly employees' time vouchers so that all time spent by them on the 8-hour shift was charged to Government jobs, regardless of whether the machinist had been idle because he was waiting for an engineer, waiting for parts, or did not have work to be done. As a result, the Government was being charged for time that was not being spent by employees on Government contract work.

I was also instructed, usually on a weekly basis, by means of a hot sheet, that certain commercial jobs were already in a cost overrun situation. My supervisors did not want us to charge any employee time to these commercial jobs that were already in cost overrun situations as indicated on the hot sheet.

In other words, since the vouchers were not supposed to show idle "time" and were not supposed to show time charged to commercial jobs that were in a cost overrun situation and on the "hot sheet," and were, of course, not supposed to show time charged to other commercial contracts, practically the only category of job left upon which time could be charged in the vouchers for these commercial contracts were rework and modification jobs, which were basically developmental U.S. Government defense contracts.

BEST COPY AVAILABLE

When I finally figured out the system and the method that was being used to defraud the Government, I talked with my supervisors, with other foremen on the job, and others. I got no response. But I refused to falsify and change vouchers. Instead, I discovered that my supervisor would then change the vouchers that I had not changed and charged the time to the Government. Sometimes, he completely substituted vouchers in order to charge time to the Government. Also, occasionally, I would be told several days after vouchers had been submitted that they had turned up "missing." Rather than let me go back and review the records to try and reconstruct what work had been done on those days, my supervisors would tell me what job numbers to fill in—always Government job numbers.

My opposition to the falsification of vouchers was well-known by my supervisors. But I got no meaningful response from my immediate supervisors when I complained about these fraudulent practices. Instead, during the spring of 1983, I was informed that I was going to be laid off due to a so-called lack of work. At about the same time, my wife, who is also employed as a machinist at General Electric Co., and I began putting together the information regarding falsification and changing vouchers. Approximately the same time as my last day of work, in late June 1983, I wrote a letter to the executive vice president of General Electric Co., Brian H. Rowe, the top General Electric executive at the Evendale plant, reporting false vouchers. I attempted to talk with Mr. Rowe and after a number of phone calls, his secretary told me that he had read my letter and that an internal auditor would investigate.

Eventually, I met with a company auditor, R.G. Gavigan. We did not meet on GE property but at a nearby restaurant. After the investigation ended in September 1983, Mr. Gavigan called me and told me that 80 percent of my allegations had been proven to be true and the other 20 percent could not be disproved. That was the last I heard from General Electric Co. regarding the falsified vouchers. As my wife is employed at General Electric Co., I know that no changes in the voucher procedures resulted after that investigation, nor am I aware of any disciplinary action taken against anyone involved.

I am not satisfied by the investigation of Mr. Gavigan, because it seemed that General Electric had not done anything to correct the situation. Moreover, I believe I was laid off because of my opposition to the false vouchering practices. I was never called back to work, even though General Electric Co. has hired thousands of new employees since then. I was personally very troubled by what I had observed at General Electric. As a taxpayer, I thought something should be done so the U.S. Government did not continue to be overcharged millions of dollars, and perhaps more.

I met with Mr. Helmer and told him that I have told you here today. I showed him many documents which supported my observations and conclusions. He, too, was very concerned, as an attorney and as a taxpayer, about what appeared to have happened at General Electric Co. and continued to be happening. However, he was not then aware of any laws that I could act upon which would do much to correct the situation. He did suggest that I could bring a wrongful discharge action against General Electric Co. Since I was

BEST COPY AVAILABLE

working at Ford in a job similar to that which I had at General Electric Co., the small amount of money which I might recover in a wrongful discharge action was such that my expenses of filing a lawsuit and paying Mr. Helmer might exceed the money I could recover.

Mr. Helmer and his staff of attorneys did not give up, however. They consulted with several other lawyers, researched the U.S. Code, and eventually became aware of the False Claims Act laws. After they informed me of these laws, I hired Mr. Helmer to take my False Claims Act case. It was filed in October 1984.

This case is an extremely risky proposition for me. First, my False Claims Act case has to be successful for me to have even my expenses recovered. Second, Chief Judge Carl B. Rubin, the judge in my case, has discretion as to how much, if any, compensation I receive for bringing this matter to the U.S. Government's attention. Out of that money, I also have an obligation to pay my attorney for his services. Right now, my out-of-pocket expenses have been about $100 a month, but Mr. Helmer tells me that if the Department of Justice will allow me to be more actively involved in the case, my expenses could easily be in the tens of thousands of dollars or more. That is only for costs. It has nothing to do with my agreement to pay my attorney for his time and efforts.

From a personal standpoint, I have invested hundreds upon hundreds of hours of my time in the case. My wife has also been very involved even though it may jeopardize her job at General Electric Co. We have received many phone calls and other inquiries from present and former employees at General Electric who reported similar experiences, as well as other employees of other companies who found themselves in similar situations.

I believe it is very important for the U.S. Government to make the False Claims Act laws stronger. If the law was stronger and, therefore, more used, more lawyers would be aware of it and be able to inform people like me about it. Also, whistleblowers like myself would have protection from losing their jobs. Also, the proposed changes would help make sure that if my lawsuit is successful, that I would receive some compensation for my efforts and for sticking my neck out. If it were not for the fact that my wife and I are both employed with steady work, we could not have taken on the financial and time demands of this lawsuit at all. As the law stands right now, we have taken on a considerable financial risk with no assurance that our efforts will be compensated.

Since my main purpose in bringing this lawsuit was to force General Electric to stop overcharging the taxpayers and the U.S. Government, I am very concerned that my case move forward. As long as the Department of Justice claims that they are investigating, however, the current law prohibits me and my attorney from being actively involved in the case. So, I would support the changes in the law that would allow me and my attorney to be actively involved to push this case to resolution and to put an end to this multimillion dollar fraud scheme.

I thank you very much for inviting me here to testify today, and I offer my assistance in your further consideration of this bill.

BEST COPY AVAILABLE

Senator GRASSLEY. Thank you very much, Mr. Gravitt. I think now I should go to James Helmer and then back to you. Would you proceed, please.

STATEMENT OF JAMES B. HELMER, JR., ESQ. CINCINNATI, OH

Mr. HELMER. Thank you, Mr. Chairman.

My name is James Helmer, Jr. I am an attorney admitted to practice in the State of Ohio and the District of Columbia. My offices are located in Cincinnati.

Upon my graduation from law school in 1975, I began work for the chief judge of the U.S. District Court for the Southern District of Ohio, Timothy Hogan.

After completing that clerkship, I spent the last 8 years involved in representing plaintiffs in Federal litigation in the U.S. district courts in Cincinnati, Dayton, and Columbus. With that, we have used a number of Federal statutes including the age discrimination laws, the truth in lending laws, the securities statutes and various fraud statutes.

My office has won every case it has tried. In every case, it has been involved with corporations as defendants and individuals as the plaintiffs we represented. That is how Mr. Gravitt ended up on our doorstep. Because of this experience I have had on almost a weekly basis in the district courts, I think it might be appropriate for me to comment somewhat on the procedures that are employed by the False Claims Act and particularly the amendments that Senator Grassley and others are proposing, because I believe that without these procedural amendments, the intent of the U.S. Congress in the qui tam provisions will be thwarted and suits such as Mr. Gravitt's will never get off the ground.

Let me echo a couple of Mr. Gravitt's comments. What he did not tell you is that he is a former U.S. Marine who was highly decorated in Vietnam, received this country's Purple Heart award for injuries suffered in battle west of DaNang.

I spent a lot of time with Mr. Gravitt reviewing his situation at General Electric. My staff and I became convinced his complaints are meritorious and indeed should be looked into.

After we filed his action in 1984, the General Electric Co. in Cincinnati presented papers in the court proceedings in which they admitted that certain irregularities and improper vouchering procedures had occurred during Mr. Gravitt's time at General Electric Co. I believe we submitted to the committee a copy of a letter from Mr. W.G. Krall, a vice president of General Electric to a Paul D. Lynch, Colonel, U.S. Air Force in which these improper procedures are confirmed. That letter was written in 1983, some 5 months after Mr. Gravitt was discharged. No action was taken by the U.S. Defense Department or the Department of Justice until Mr. Gravitt's suit was filed in 1984, nearly 11 months later.

As the statute is written now, there are very few practicing attorneys who are aware that it even exists. When Mr. Gravitt first came to us, we became concerned that the representations he was making should be against some law somewhere. We could not find such a law. In the State of Ohio and many other States, there is no protection for whistleblowers under State law. There is no protec-

BEST COPY AVAILABLE

tion under the Federal laws for Mr. Gravitt or those who step forward with information and false charges. I welcome the Justice Department to present me with citations which would allow us to provide such protection for Mr. Gravitt. We do not believe it exists.

Senator GRASSLEY. You remember the testimony that the Justice Department gave. They thought there was some protection.

Mr. HELMER. Senator, I spent 8 years in this area representing individuals who have lost their jobs, and I can represent you in the State of Ohio, there is no such law. There is only one wrongful discharge case that ever found for an employee in that case.

Senator GRASSLEY. And there is no Federal law.

Mr. HELMER. There is no Federal statute. It took an associate in my office, Ann Lugbill, 6 months to find this statute that you are addressing. The reason is it is buried in the banking regulations as you know. It is not the first place you would look for a False Claims Act.

If the act is not in need of amendment, I would suggest to you that there would have been several more of these cases brought since 1943. I believe if you check the reported cases, there are somewhere in the neighborhood of 10 such cases that have been brought in the last 43 years.

I believe that speaks volumes about the need to encourage people to come forward with the type of information which Mr. Gravitt has submitted today and which he submitted in October 1984.

I might add that when I filed this suit, I sent a copy of it to the office of the Attorney General of the United States, and I received an irate call a couple of days later from a member of his staff asking me why I had the audacity to send that complaint there. When I explained the statute required it, I received a long pause at the other end of the telephone and then was asked why did you not bring this information to us prior to filing your suit. I then explained that as the statute is now written, without the benefit of the amendments that you are proposing, that that would have barred Mr. Gravitt from bringing this case to light, even though arguably the Defense Department has known about these improper procedures since November 21, 1984, and had chosen to take no action.

Next, I would like to address the protection for whistleblowers because I believe it is critical. A man's job is one of the most important things he possesses. Without that job, he cannot provide for the well-being of his family which is another important thing that a man has. He cannot provide for the health needs of his family. He cannot provide for the security that this society requires of individuals. If you take away that job from someone without a just cause, it seems to me individuals should have the right to fight to reacquire that job. There is no way Mr. Gravitt through any court proceeding can get his job back at General Electric as the law stands now.

In all other areas of civil rights, in title VII, in the age discrimination statute, even in the EPA statutes, whistleblowers and those who have testified or assisted someone in the prosecution of a case are protected from retaliation. This is one glaring deficiency in the law. It is a crack.

BEST COPY AVAILABLE

Senator GRASSLEY. Let's clarify. There is no way that person can get his job back?

Mr. HELMER. That is correct. There is no statute.

What I am saying is there are several statutes in other areas which provide for protection from retaliation. It is not uncommon from the law whether it is age or sex discrimination. If you bring such charges, you can get your job back. You cannot in this area.

If individuals at the General Electric Co. step forward to assist Mr. Gravitt in his case, there is no way they can be protected. There is no manner of protection in the laws today that protects them from even assisting Mr. Gravitt. This is something which is addressed in your bill, Senator, and I would urge you most strongly that you redouble your efforts to make sure that it is included in anything that is submitted to the entire Senate. It is greatly needed in this area.

Next, as it stands now, there is no provision in the act for an award of attorney's fees. I have some self-interest in this area admittedly, but we did not take on Mr. Gravitt's case with the idea of receiving attorney's fees. I would suggest like many citizen in the State of Ohio, we are absolutely outraged by the conduct uncovered by Mr. Gravitt. We believe that the only way that this conduct is going to be stopped is if it is brought to the attention of the proper authorities and action is taken.

Senator GRASSLEY. Do you have any examples of things like Mr. Gravitt uncovered, such as other timecards?

Mr. HELMER. Sir, I have brought with me several timecards that Mr. Gravitt was able to make copies of before he was discharged. These timecards are not changed in a subtle fashion. What was done was the timecard that was filled out by the employee doing the job would write out a job number on the timecard and submit that to his supervisor. The supervisor or other unknown person simply took a darker colored pen and wrote over a B-1 job number over the private contract number. This was done in such a way that you can still read the original numbers under the time voucher.

We turned this information—and we have over 150 of these vouchers. You have to remember, there are tens of thousands of these vouchers turned in every month at the General Electric plants in Cincinnati. We turned these vouchers over to the FBI who ran handwriting checks on the vouchers. We turned these over to Mr. Brian Rowe, I should say Mr. Gravitt did, to show him what was going on. The General Electric Co. ran a statistical study. It did not use the vouchers we provided. It went out of the tens of thousands of vouchers and pulled 133 to examine. Of those 133 vouchers, the General Electric Co. concluded that it had, indeed, mischarged the United States of America, but the General Electric Co. contends that it underbilled the United States some $41,000, and it suggested to us and the U.S. attorney in Cincinnati that if we did not drop our lawsuit, if we did not dismiss our case, the General Electric Co. would bring a countersuit against the United States to recover that $41,000 which it claimed it underbilled the United States.

I also have some swampland in Florida that I have been trying to unload. Whoever takes the position that such creative account-

BEST COPY AVAILABLE

ing would standup in a court of law, I would like to talk to them about that swampland.

Senator GRASSLEY. I hope we can have a copy of those for our record.

Mr. HELMER. We will make copies available, Senator, as we have done to the authorities and we are still waiting at this point for action from the Department of Justice.

Let me just conclude my remarks, sir——

Senator GRASSLEY. I need a generalization as to whether this manner of mischarging timecards is a reflection that that sort of activity is commonplace with timecard fraud?

Mr. HELMER. I have received numerous telephone calls from employees and past employees of the General Electric Co. since Mr. Gravitt's case has been filed and the media has given it some attention in the Cincinnati community. Not one person has told us that we are not on to something, that we are all wet. Every individual has said, "If you think that is bad, wait until you hear my story." Many of those individuals to this day are afraid to come forward because there is no protection for them in the U.S. laws and because they have seen no action taken by the Department of Justice in pursuing Mr. Gravitt's case.

If I might point out, sir, the Department of Justice did move to take over prosecution of Mr. Gravitt's civil suit in late December of 1984 to oust Mr. Gravitt from prosecuting that case.

Senator GRASSLEY. That has to be an editorial conclusion that you came to to oust him or do you have some information that leads you to know that is a fact?

Mr. HELMER. Yes, sir, the information I have leads me to know that is fact. When Mr. Gravitt's case was filed, he caused to be served on the General Electric Co. hundreds of requests for documents and interrogatories and even noticed the depositions of Mr. Gavigan and Mr. Rowe so we could get this story and get to the bottom of it. We are not talking about a year later—45 days after the complaint was filed. The first action taken by the United States of America was to stay or stop all that discovery. That was done in December. To this day, no discovery has gone on under Mr. Gravitt's civil suit.

The Department of Justice has said let the qui tam plaintiff participate by receiving copies of pleadings. In Mr. Gravitt's case, that is going to be a short list because there are no pleadings that have been filed except for repeated requests for extensions from the court. That is the only thing you will find in that file. There have been no discovery proceedings, there have been no motions filed, there is nothing to object to at this time because there has been no movement on his civil case. This is some 11 months after it has been filed. To put that in proper perspective, Mr. Gravitt's case has been assigned to Chief Judge Carl Rubin who is a U.S. district judge of some repute in Cincinnati. Judge Rubin has a rule that requires all civil cases filed before him to be disposed of within a year of being filed, which means that Mr. Gravitt's case has to be dismissed, settled or tried by November of this year.

At this point in time, the Department of Justice has done nothing toward pursuing that civil case so that Judge Rubin's schedule can be adhered to. Had Mr. Gravitt been permitted, as amend-

BEST COPY AVAILABLE

ments to your statute suggest, had he been permitted to maintain his position in the lawsuit, I can assure you that that discovery would have been completed and this case would be ready to go to trial in November 1985.

As it stands now, there are serious questions as to when, if ever, this case can go forward.

Finally, Senator, there is no cost to the United States of America or to the taxpayers to letting individuals like Mr. Gravitt proceed with these qui tam actions. There is no cost to the Treasury. There is no cost to anyone in saying a defense contractor has actually committed fraud upon the taxpayers.

I would suggest to you because of that, the Government of the United States and the Department of Justice has everything to gain by allowing these qui tam actions to proceed and absolutely nothing to lose.

Thank you very much for your time this morning.

[Statement follows:]

BEST COPY AVAILABLE

PREPARED STATEMENT OF JAMES B. HELMER, JR.

My name is James B. Helmer, Jr. and I am an attorney licensed to practice law in the State of Ohio and in the District of Columbia. My law offices are located at 2305 Central Trust Tower, One West Fourth Street, Cincinnati, Ohio. I represent John Gravitt in his False Claims Act suit brought against Defendant General Electric Company.

I would like to echo the comments of Mr. Gravitt and the prior speakers in supporting S. 1562 which would amend the False Claims Act and Title 18 of the United States Code regarding penalties for false claims and other purposes. My support is based upon both my personal experience in handling Mr. Gravitt's False Claims Act and my experience in litigation in the federal courts.

I would like to add a few comments to those of Mr. Gravitt. First, I would like to emphasize to you the personal sacrifice which Mr. Gravitt and his family have made in involving themselves in this lawsuit in order to bring to light what they believe are illegal and immoral practices. Mr. Gravitt, after long and careful consultation with me and several other attorneys, as well as his family, made the difficult decision to bring this False Claims Act case and take on one of the largest corporations in our country. What Mr. Gravitt did not tell you, by way of his background, is that he is a Viet Nam war veteran, a former Sergeant in the United States Marine Corp., wounded in battle and a recipient of a Purple Heart. It was in learning about Mr. Gravitt's background, as well as the facts of his False Claims Act case, that I became convinced that his lawsuit was anything but frivolous. Indeed, General Electric has admitted that "irregularities" in its claims procedure exist but claims that it only cheated itself of more taxpayers monies as a result of these false billing claims.

BEST COPY AVAILABLE

I graduated from the University of Cincinnati Law School in 1975. Thereafter, I was a law clerk to Chief Judge Timothy S. Hogan of the United States District Court for the Southern District of Ohio. Since 1977, I have been in the private practice of law and my practice has been exclusively devoted to complex litigation, primarily in the federal Courts in southern Ohio. As such, I am very familiar with the impact that procedural changes can have upon substantive laws. Procedure can often prevent Congress' intent from being fulfilled. The False Claims Act, as it currently stands, is one example of how procedures can be used to thwart the Congressional intent of prohibiting false and fraudulent practices by defense contractors.

First, the current False Claims Act, as written, is a little-known law. It will remain unknown to most lawyers unless it is strengthened. Thus, whistleblowers, like Mr. Gravitt, will never be able properly to bring fraudulent practices of government contractors to the attention of the public because they will not be aware of the legal method of doing so. The amendments proposed will strengthen the Act and, therefore, make it more attractive to lawyers and litigants and, therefore, encourage persons with knowledge of fraudulent practices to bring them to the attention of the United States Government and will encourage both the Department of Justice and private litigants to prosecute fraudulent contractors.

As Mr. Gravitt testified, the proposed amendments which would increase the amount a private party such as Mr. Gravitt could recover as well as making the amount of recovery less discretionary with the Court, would help to make this statute much stronger and more attractive to litigants. As it stands now, even if his lawsuit is successful in recovering millions of dollars for the United States Government, Mr. Gravitt is not assured of one penny in compensation. It is completely within the Court's discretion as to the dollar amount to which he will

BEST COPY AVAILABLE

be entitled and that amount will not be determined until the end of the litigation. This is a substantial risk that most potential False Claims Act plaintiffs could not undertake.

As the False Claims Act presently stands, there exists no protection from retaliation for whistleblowers like Mr. Gravitt. Ohio, like most states, recognizes the ancient doctrine of at-will employment which permits an employer to terminate an employee at any time for any or no reason. While there exists some statutory protection against discharge for certain discriminatory reasons, a whistleblower has no rights under state law to be reinstated to his former employment. We advised Mr. Gravitt that there exists no federal or Ohio law by which he could regain his employment at General Electric.

Thus, the amendments proposed by Senator Grassley which would provide protection from retaliation for those who oppose and bring to light false claims is critical. A job in our society is one of the main determinants of an individual's worth and ability to provide for his family. Unfortunately, few individuals have the courage displayed by Mr. Gravitt to risk their jobs to bring unlawful employer practices to light. Providing protection for employees will encourage them to step forward with their knowledge of improprieties.

The amendments to the Act which provide for attorneys fees, would also greatly strengthen the Act and make it more viable. Attorneys fees can vary greatly from case to case, depending upon the complexity of the case, the number of documents involved, the ferocity of the opposition, whether or not the Department of Justice is actively involved and does a thorough investigation, and upon numerous other variables such as the number of witnesses, the length of time involved, the number of procedural hurdles to overcome, etc. A provision allowing compensation for False Claims Act plaintiffs to request attorneys fees, in addition to their percentage recovery, would

BEST COPY AVAILABLE

further encourage individuals to bring illegal practices to the United States Government's attention.

I further support the amendments which allow the False Claims Act plaintiff, by and through his counsel, to remain in the action as a full party even though the United States Government intervenes in the case. In Mr. Gravitt's action, for example, his participation has been limited to filing the initial action, serving discovery upon Defendant General Electric Company, and cooperating with FBI agents who were conducting the criminal investigation for the Department of Justice. In the civil action, the Department of Justice has not requested any discovery and its main activity has been to request that Chief Judge Rubin postpone the case until a later date. Fortunately, Chief Judge Rubin operates an extremely efficient Court in the Southern District of Ohio, attempts to bring cases to trial within approximately one year of their filing, and has denied the Department of Justice's latest request for a postponement. However, so long as Mr. Gravitt is not involved, nothing prevents the United States Government and General Electric Company from "settling" his case for a nominal amount to avoid adverse publicity concerning defense procurement efforts. Such an event occurred in a False Claims Act suit brought in 1982 against Litton Systems, Inc. involving Navy contracts.

In short, Mr. Gravitt and other private litigants, if they were allowed the right to remain in the action as a full party, could act as watchdogs over taxpayers' funds and ensure that fraudulent contractors pay an appropriate amount of damages.

BEST COPY AVAILABLE

GENERAL ELECTRIC NOV 2 3 1983

W G KRALL
[illegible]
[illegible]
[illegible]
CINCINNATI, OHIO 45215

November 21, 1983

Paul D. Lynch
Colonel, USAF
Air Force Plant Representative
General Electric Company
Cincinnati, Ohio 45215

Dear Paul:

The purpose of this letter is to summarize the results of our audit of the alleged labor vouchering irregularities in the Development Manufacturing Operation (DMO). This review was performed by Evendale Production Division financial personnel under the direction of Evendale Internal Auditing. In addition, support in the statistical application was provided by General Electric's Corporate Audit Staff.

As you recall, allegations concerning improper labor vouchering in DMO were first made this past summer by a former employee. The existence of improper practices was confirmed during extensive interviews conducted by personnel from Evendale Auditing and Security. During these discussions, the interviewers indicated that the motive for the improper practices was to meet internal measurements.

During October 1983, a voucher sample was selected for review. The purpose of this review was to quantify the potential dollar impact of the irregular practices on Government contracts. The sample was a dollar unit sample, and consisted of 133 vouchers. The total population was vouchers from the three year time period which aggregated $6.1M in extended cost. Statistical extrapolation of the errors disclosed in the sample has resulted in a 95% confidence level in the following projected impact for the three year time period:

Underbilling to Government	$185 000
Overbilling to Government	138 000
Net underbilling to Government	$47 000
No effect	$163 000
Unknown	$ 41 000

Although the results of the sample did not indicate any net adverse impact on Government contracts, and although this situation occurred in a relatively small operation (DMO), we consider that the identified problems represent a serious breach of our policies. Accordingly, the following actions have been taken to ensure meeting our commitment to proper vouchering practices:

1. On December 15, each Department Manager in Manufacturing will issue a letter to all salaried employees affirming our commitment to proper adherence to voucher instructions.

2. Attached to the letter will be a revised, more comprehensive vouchering instruction.

3. Each supervisor will be required to sign an acknowledgment form that he understands the vouchering procedures and will adhere to them.

4. The three managers who were involved in the improprieties have received appropriate disciplinary action.

I would be happy to discuss this further at your convenience.

Sincerely,

W.G. Krall

/djw

BEST COPY AVAILABLE

14523 MARCUCCI 2520 0110 1 6-15-93

1	E0022	8	W	30		17.8905 Co 003+003
2						
3						
4						
5						
6						
7						
8						

LABOR VOUCHER — TOTAL 8.0 — John Hupp

[illegible] 2520 0110 1 6-15-93

1	E0022	8	-	31	70	2999 112
2						
3						
4						
5						
6						
7						
8						

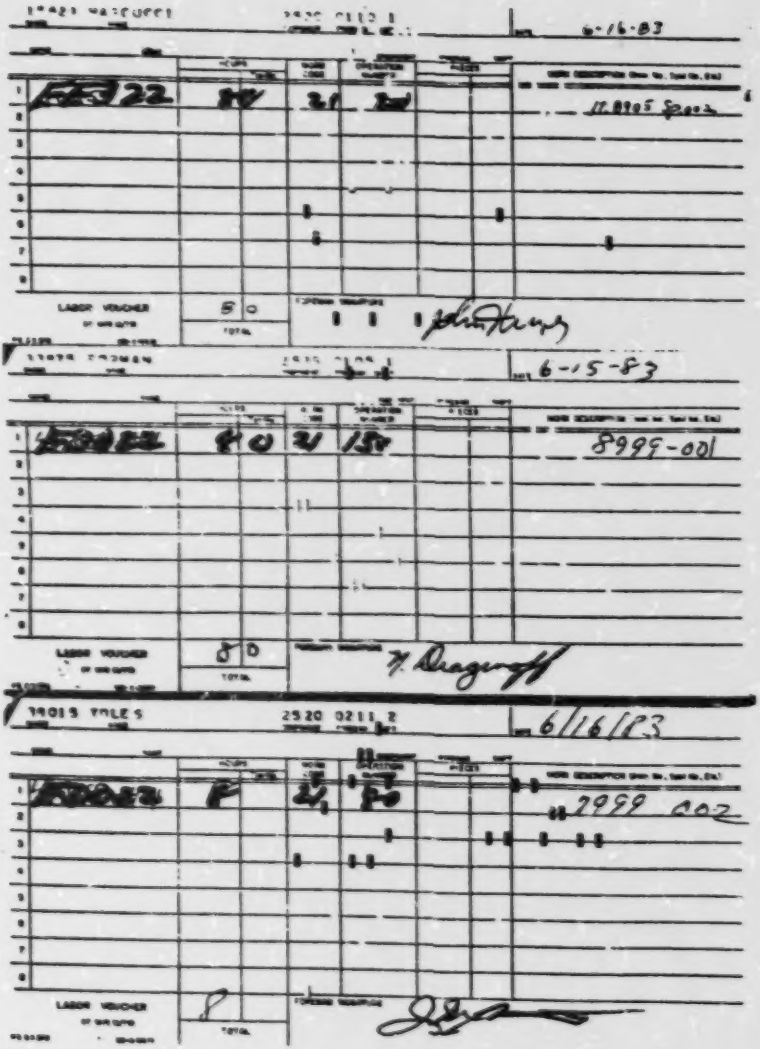
LABOR VOUCHER — TOTAL 8 — John Hupp

58272 7008 2520 0110 1 6/16/93

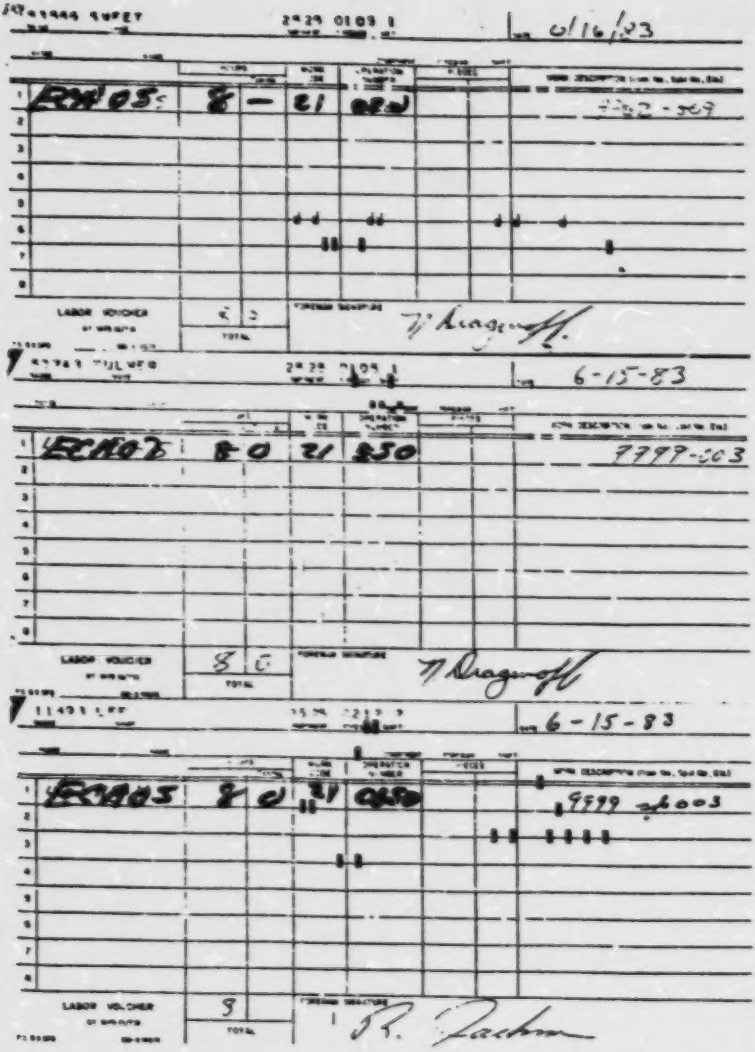
1	[illegible]	8		87	0418	
2						
3						
4						
5						
6						
7						
8						

LABOR VOUCHER — TOTAL 8.0 — John Hupp

BEST COPY AVAILABLE



BEST COPY AVAILABLE



BEST COPY AVAILABLE

40147 CUMMINS			2520 0110 1					6-15 83	
1	RGA05	8		88	170			999 505	
2									
3									
4									
5									
6									
7									
8									
LABOR VOUCHER NUMBER		8		FOREMAN SIGNATURE					
46032 PICE			2525 0100 1					6/15/83	
1	KR138	10		N/A	50			9999-504	
2									
3									
4									
5									
6									
7									
8									
LABOR VOUCHER NUMBER		80		FOREMAN SIGNATURE					
40475 PESOR			2525 0100 1					6-16 83	
1	KR138	8		24	65			9999-7	
2									
3									
4									
5									
6									
7									
8									
LABOR VOUCHER NUMBER		8		FOREMAN SIGNATURE					

BEST COPY AVAILABLE

28629 PINSON 2525 0212 2 6-15-83

1	EQ05	80	U	210		9999.2
2	[redacted]					
3						
4						
5						
6						
7						
8						

LABOR VOUCHER — 80 TOTAL — FOREMAN SIGNATURE R. Jackson

43093 COLE 2520 0110 1 6/15/83

1	EQ05	8	U	40		
2						
3						
4						
5						
6						
7						
8						

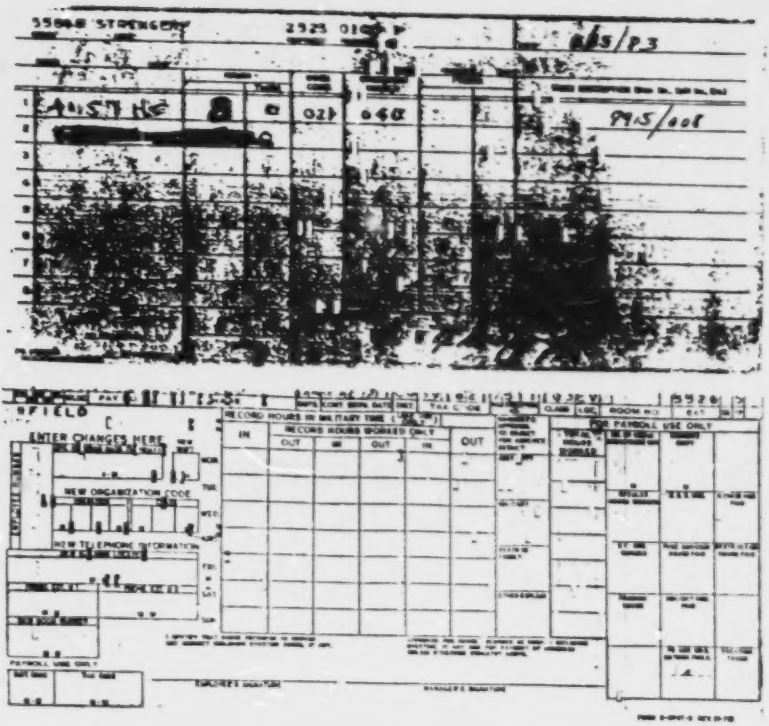
LABOR VOUCHER — 8 TOTAL — FOREMAN SIGNATURE John Tyler

43094 FOWLER 2520 0110 1 6-15-83

1	EQ05	80	U	40		99.2
2						
3						
4						
5						
6						
7						
8						

LABOR VOUCHER — 80 TOTAL — FOREMAN SIGNATURE [signature]

BEST COPY AVAILABLE



26629 ENSON 2525 0212 2 6-16-83

1	[illegible]05	8		21	220		9999-2
2							
3							
4							
5							
6							
7							
8							

LABOR VOUCHER — TOTAL 8 — FOREMAN SIGNATURE R. Jackson

[illegible] 2525 0212 2 6-16-83

1	[illegible]05	8		21	040		9915-001
2							
3							
4							
5							
6							
7							
8							

LABOR VOUCHER — TOTAL 8 — FOREMAN SIGNATURE R. Jackson

95908 STRINGER 2525 0105 1 6/16/83

1	[illegible]05	8	0	021	040		9915/001
2							
3							
4							
5							
6							
7							
8							

LABOR VOUCHER — TOTAL 8 0 — FOREMAN SIGNATURE W Daggett

BEST COPY AVAILABLE

21048 SPARKS 2525 0109 1 6/15/83

1	EB05	8	0		4W			Alazzle's 9999
2								
3								
4								
5								
6								
7								
8								

LABOR VOUCHER 8 0 TOTAL FOREMAN SIGNATURE N Dragenff

07207 BISHOP 4545 0105 1 6/15/83

1	EB342	8	0	21	60			
2								
3								
4								
5								
6								
7								
8								

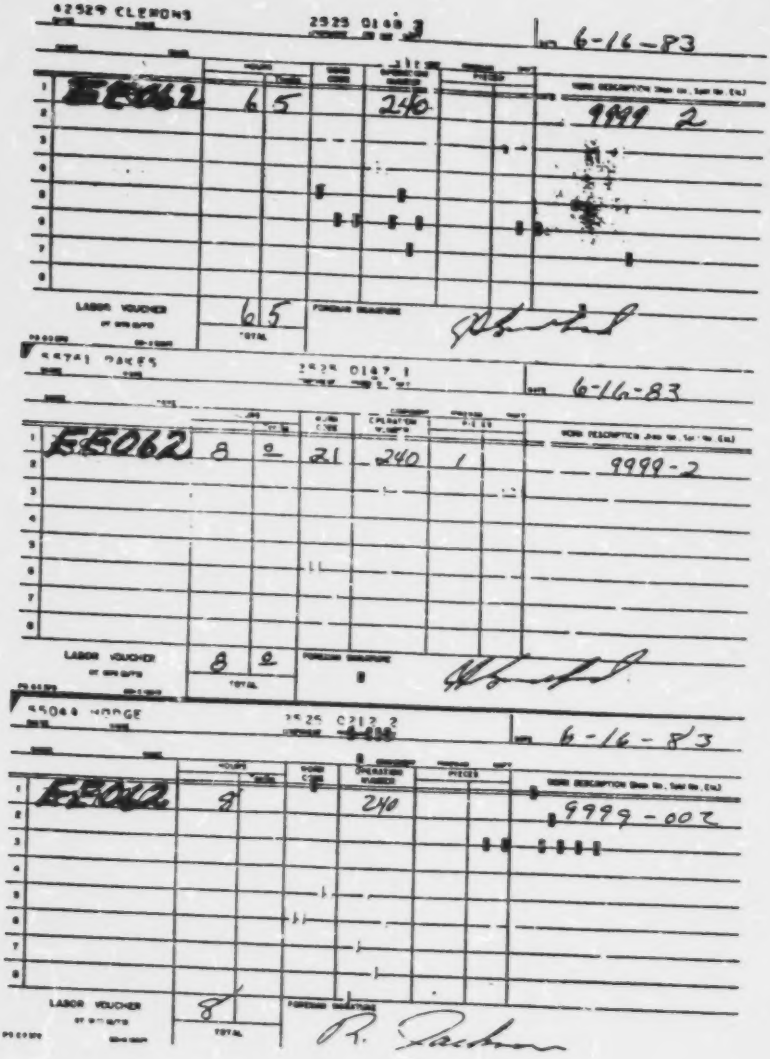
LABOR VOUCHER 8 0 TOTAL FOREMAN SIGNATURE N Dragenff

16184 JOHNSON 2527 0211 2 June 16, 1983

1	SB823	8	0	35	Plumb			99999-3
2								
3								
4								
5								
6								
7								
8								

LABOR VOUCHER 8 0 TOTAL FOREMAN SIGNATURE

BEST COPY AVAILABLE



BEST COPY AVAILABLE

[redacted] 2525 0107 1 6-15-83

1	[redacted]	8	0	21	350	1	9999-2
2	[redacted]					1	[redacted]
3	[redacted]						
4							
5							
6							
7							
8							

LABOR VOUCHER — TOTAL 8 0 — FOREMAN SIGNATURE

[redacted] VARTUNKOVIL 2525 0105 1 6-16-85

1	EE242	8	0	21	350		9909-001
2							
3							
4							
5							
6							
7							
8							

LABOR VOUCHER — TOTAL 8 0 — FOREMAN SIGNATURE N Dragoff

9490 J REITLER 1st 6/10/83

1	D EE242	6	0				
2	D 5936	2	0				
3							
4							
5							
6							
7							
8							

LABOR VOUCHER — TOTAL 8 — N Dragoff

BEST COPY AVAILABLE

6-16-83

1	EE324	60	01	130	8999-1

LABOR VOUCHER — TOTAL 60 — FOREMAN SIGNATURE R. Jackson

15304 HANCOCK — 2520 0110 1 — 6-16-83

1	EE322	80	21	90	15-7999 SPEC 2

LABOR VOUCHER — TOTAL 80 — FOREMAN SIGNATURE John Hicks

55046 HODGE — 2529 0212 2 — 6-15-83

1	EE032	8-		3/5	9999-2

LABOR VOUCHER — TOTAL 8 hrs — FOREMAN SIGNATURE R. Jackson

BEST COPY AVAILABLE

91949 WHITACRE 2920 0110 1 6/15/83

1	EC405	8	0	21	020	9999-7
2						
3						
4						
5						
6						
7						
8						

LABOR VOUCHER — TOTAL 8 0 — FOREMAN SIGNATURE John Thayer

33979 [illegible] 2925 0169 1 6-16-83

1	EE312	8	0	4	180	8999-001
2						
3						
4						
5						
6						
7						
8						

LABOR VOUCHER — TOTAL 8 0 — FOREMAN SIGNATURE N Dragunoff

34207 RILEY 2925 0169 2 6 — 17 — 83

1	EE312	8	0	33	130	Item 8999 Sub 1
2						
3						
4						
5						
6						
7						
8						

LABOR VOUCHER — TOTAL 6 5 — FOREMAN SIGNATURE N Dragunoff

BEST COPY AVAILABLE

-1730 PIGGINS 2525 0105 1 6/16/83

1	FA231	7		21	50	1	9999-9
2							
3							
4							
5							
6							
7							
8							

LABOR VOUCHER — TOTAL 7 — FOREMAN SIGNATURE W Dagnoff

55035 SHEPARD 2525 0109 1 6-16-83

1	FA231	4	0	21	110		9999-1
2	FA234	4	0	21	110		3333-5
3							
4							
5							
6							
7							
8							

LABOR VOUCHER — TOTAL 8 — FOREMAN SIGNATURE W Dagnoff

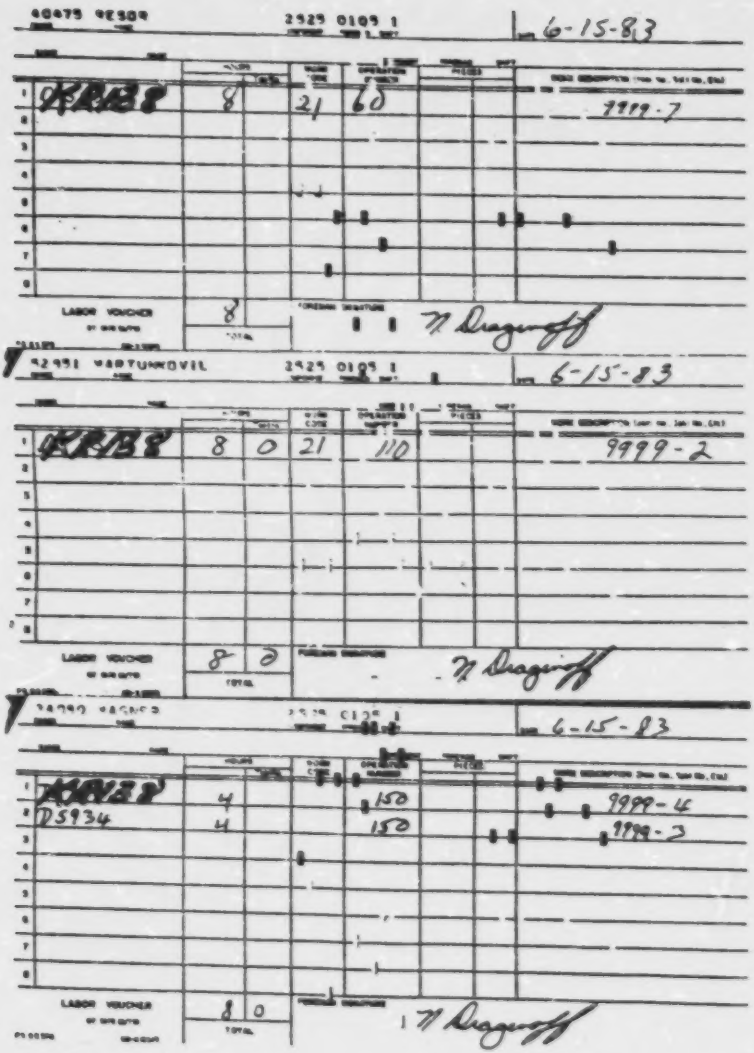
[redacted] 2525 0147 1 6-16-83

55315 ACKLEY

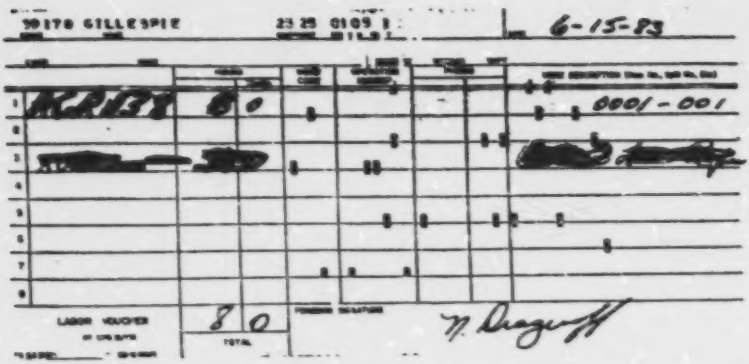
1	[redacted]	[redacted]					[redacted] ACKLEY
2	X0201	1	0				ROUNDTABLE
3	38600 H5	7	0				
4							
5							
6							
7							
8							

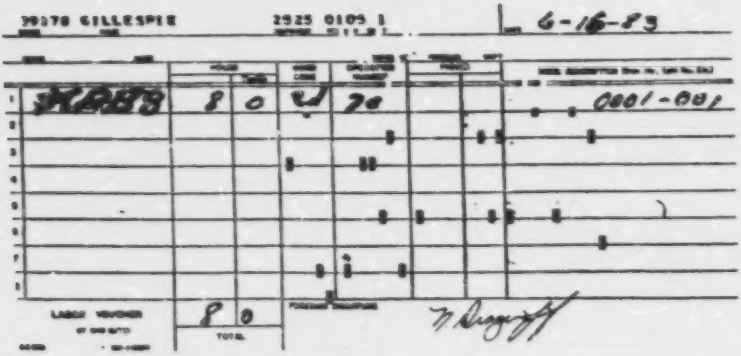
LABOR VOUCHER — TOTAL 8 0 — FOREMAN SIGNATURE [redacted]

BEST COPY AVAILABLE



BEST COPY AVAILABLE





BEST COPY AVAILABLE

93316 PETERS 2525 0147 1 6-15-83

1	ECROS	STD	2	40	
2					
3					
4				15	
5					
6					
7					
8					

LABOR VOUCHER TOTAL 3 0

93098 CHILES 2520 0110 1 6-16-83

1	ECROS	8	-	21	60
2					
3					
4					
5					
6					
7					
8					

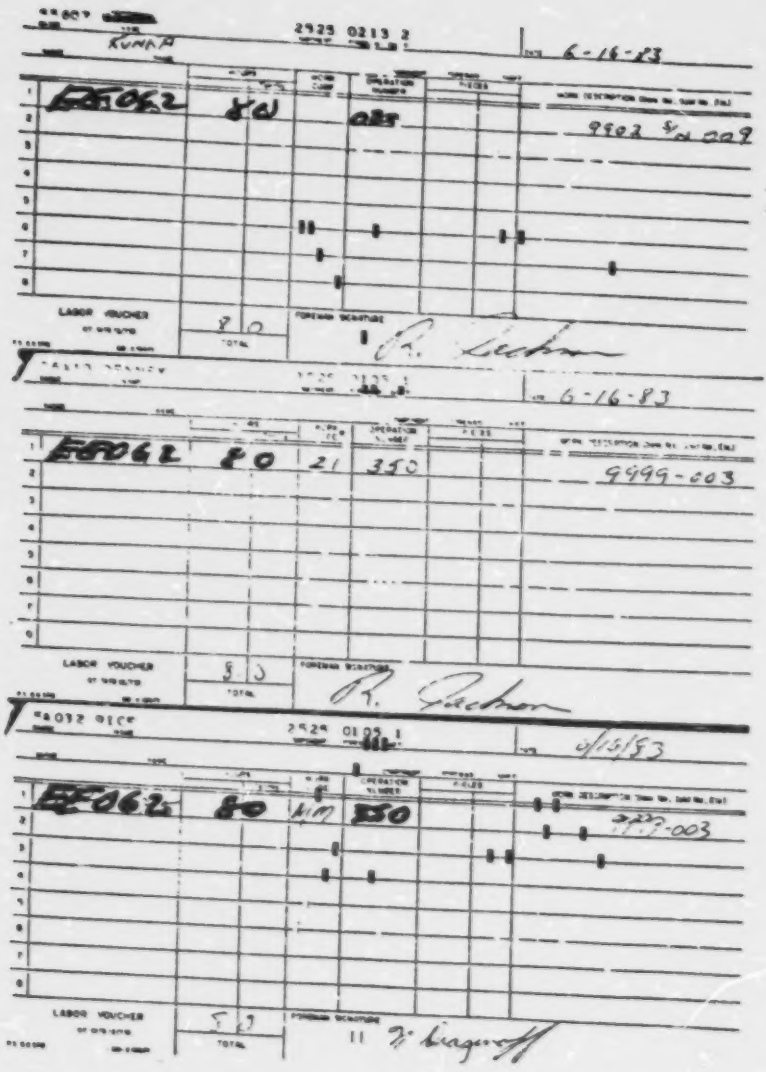
LABOR VOUCHER TOTAL 8 0

23933 COLE 2520 0110 1 6/16/83

1	45584	8	0	-	30
2					
3					
4					
5					
6					
7					
8					

LABOR VOUCHER TOTAL 8

BEST COPY AVAILABLE



BEST COPY AVAILABLE

Senator GRASSLEY. Mr. Wityczak, can you summarize your statement in 5 minutes? Your full statement will be included in the record and your summary will set the ground work for questions I have.

STATEMENT OF ROBERT WITYCZAK, LOS ANGELES, CA

Mr. WITYCZAK. Thank you, Mr. Chairman.

I am a Vietnam veteran and I do believe our country needs a strong defense which is why I went to work for Rockwell in 1973. Yet, I soon found I was forced to choose in this position between loyalty to my company and loyalty to my country. My ethical principles and duties were tested to their very limits by having to either keep quiet about the mischarging I saw going on in Rockwell, or risk losing my job. I agonized over my decision to step forward. I have a wife, five children and a house mortage, and I had to provide a living.

Yet, once I made the decision to tell the truth about what was going on, I found no one inside or outside the company willing to act on the information. I had no job protection whatsoever and no support from any of the governmental agencies I approached, as I will describe in this testimony.

In 1973, I was hired in Rockwell's products support group, space transportation system in Downey, CA. My job involved processing materials orders, updating status of books, checking corrections of material orders, and expediting orders from outside vendors.

In early 1974, I started noticing mischarging of work during the Apollo-Soyuz Test Program. This is a fixed-price contract and I saw work being charged on timecards to cost-plus programs. I also began to notice certain items being ordered for personal use which were billed to cost-plus contracts, including excessive amounts of 24 karat gold polymide tape, exotic woods, wallpaper, and carpeting. I talked to my group leader about this but nothing was done.

In 1974, I was assigned to the products support function of production control and received an excellent employee performance review. Yet, I was still facing a tremendous personal conflict inside between my loyalty to the company and my loyalty to my country. I was in a state of turmoil about the cheating and mischarging going on in my company, and not able to talk about it to anyone, due to my Rockwell security briefing and feeling of loyalty to my friends. I felt a deep conflict inside concerning the oath I had taken as a junior vice-commander of the Military Order of the Purple Heart and the Vietnam Veterans Advisory Committee to report any corruption I saw.

Senator GRASSLEY. When you told them about these sorts of things being done, did they say something in particular or did they just ignore what you said?

Mr. WITYCZAK. At that timeframe, I was just a thorn in the side and I was pushed aside and nobody was really paying that much attention.

Senator GRASSLEY. Proceed.

Mr. WITYCZAK. In 1976, I was assigned to the purchased labor section of products support and, in 1977, promoted to a position in which I ordered materials directly from outside suppliers. It was in

BEST COPY AVAILABLE

this 1976-77 period that I continually saw mischarging of work on other projects to the space shuttle. I saw tools coming in from other departments without paperwork. Normally, parts should have tickets on them showing the work to be done, but these had no paperwork. They were from Seal Beach and Downey departments. I checked the space shuttle blueprints on these and the material callout sheets which designated which parts are needed. I found no callouts, so I reported this to the head of purchased labor. I was told by him to just do as I was told.

This was part of an elaborate scheme to charge work on other projects to the space shuttle. These tools, or fabricated parts, which were being sent out for work, were actually for the global positioning satellite [GPS], the NAVSTAR, P-80-1, the teal amber, and teal ruby satellite systems. Surely this practice would explain why Rockwells fixed price contracts come in on budget, while cost-plus contract (shuttle) goes way over budget.

In addition, I was ordered by our supervisors, along with 25-35 other employees in my office, to bill to the space shuttle time we had actually spent working on the B-1 bomber, teal ruby, P-80, and GPS satellites. I did file false timecards for a while, because I was feeling pressured to keep my job and go along with peer pressure.

On numerous occasions, when the word went out that the Defense Contract Audit Agency was investigating, the people in our department were alerted by management of the other department and told to cover up by keeping certain 918L forms on their desks which would match their timecards. The time was normally charged on a daily basis, but in reality our department was instructed how to file time charges at the end of the week. Yet, once we were questioned by the auditors, I would question it.

Yet, it really began to bother my conscience and I told my supervisors in late 1977 that I would no longer mischarge on my timecards. They reacted angrily, calling me antimanagement, anti-Rockwell, and a pain in the ass. Coworkers warned me that my refusal to mischarge would cost me my job and future. Supervisors often had me sign blank timecards, which they filled in later, often incorrectly. Gradually, I was squeezed out of the work I was doing. I was stripped of my confidential security, my access to documents was limited, I was excluded from meetings, and was put to work doing menial tasks outside my job description, such as sweeping, making coffee, and cleaning a 50-gallon coffee pot. The tasks were often difficult physically, and my back condition was aggravated, and I had to take medical leave.

Senator GRASSLEY. Are you saying that time fraud is ignored by our own governmental auditors as well as within the company?

Mr. WITYCZAK. No, sir, let me clarify that. What I meant by that statement was that auditors are completely innocent of this, at least what I have seen. They have no chance to conduct a sincere audit, because if they even hit anywhere near that plant, the whole plant is put on red alert, as they say in the service, and you see nothing but commotion running through the offices.

Senator GRASSLEY. So everybody cleans up their act when the Government auditors arrive?

BEST COPY AVAILABLE

Mr. WITYCZAK. Yes, sir; there were numerous occasions that we were instructed that DCAA auditors were in the area. We are instructed to take out a timecard and to make sure that we had paperwork or tickets to match the charges on the timecards and they would be filled out on that day, sir.

Senator GRASSLEY. Do you know the auditors are coming before they get there?

Mr. WITYCZAK. Yes, sir, on numerous occasions.

Senator GRASSLEY. Do the DOD auditors call up and say when they will be there?

Mr. WITYCZAK. No, the way that took place in the situations I am referring to, when the DCAA auditor would come and say to a department, surprise, if he happened to make a surprise visit to them, immediately upon them realizing a DCAA auditor is within the vicinity, they put every department on red alert and say get everybody's timecards out and make sure there are papers to substantiate whatever is in the charge. If they do match, make sure you take them out and issue another card.

Senator GRASSLEY. Does that happen at GE, too?

Mr. GRAVITT. Yes, sir, but it goes through just like wildfire. It is just word of mouth auditors are here and everybody straightens up their act.

Senator GRASSLEY. Does that make Government audits a sham?

Mr. GRAVITT. The Government auditors, Senator, don't really know what they are looking at to start with. They don't know whether the guy is working on a B-1 engine or a carburetor for his car. They don't know the difference. As long as the paperwork matches up, they don't really know what is going on.

Senator GRASSLEY. Your comment on that Mr. Wityczak?

Mr. WITYCZAK. I believe if the auditors put in a little more initiative, not to say they haven't, but if an auditor were to ask me does this timecard accurately reflect what I have seen here, I would have told him no. As a matter of fact, I was working on this program over here but they told me not to charge it.

Senator GRASSLEY. Does that make the point that private citizens have to be involved if we are going to be successful in keeping this stuff under control?

Mr. WITYCZAK. Yes, sir, in order to stop the raping of our country.

Senator GRASSLEY. Mr. Gravitt.

Mr. GRAVITT. Yes, sir.

Senator GRASSLEY. This is systematic. The Department of Justice told us that they have it under control.

Mr. WITYCZAK. As far as that is concerned, Mr. Chairman, I tried to go through the proper internal channels but got absolutely no results. For example, in 1978, I turned over some documents indicating mischarging and theft to a supervisor and another company official. They promised to pass on the material to Rockwell security and the FBI. However, I never heard from the FBI and, a year later, I discovered that the documents were in fact turned over to the people doing the mischarging. I was questioned by Rockwell security if I was responsible for the mischarging and theft. Other outside complaints had no impact on my situation either. In December 1979, I had met with someone from the NASA inspector general's

BEST COPY AVAILABLE

office and had given him some documents. I was told the grand jury would probably call me to testify. I never was called.

From that time on, I began to continually get harrassed on the job. I returned from a medical leave and found my desk was gone. I was told I would no longer be doing my old job and had to train others to do the work I had been doing. My supervisors made me work in a tool control area where I had to engage in heavy physical labor which was quite taxing on my health. For example, I had to pick up and inventory numerous items, including tooling parts, drill jigs, and compressed wood form blocks. These items were very heavy and quite hard to handle. I had to try to balance them with great difficulty on my wheelchair and sometimes the pieces would fall and hit me.

The harrassment didn't stop there. In 1981, I was assigned to the machine shop where I had to unload and store all the parts that came to the shop. To reach shelves ranging from 4 to 12 feet high I had to stand up and balance myself in my wheelchair on my stumps and sometimes I would fall and hurt myself.

While coworkers sympathized with me, no one objected to management. I complained to a company Equal Employment Opportunity official and nothing happened. My supervisors probably assumed that I would quit if they made things tough enough for me. But in the Corps, they teach you when the going gets tough, the tough get going.

The harrassment and pressure never stopped. It just kept increasing. In May 1982, I returned to work from a medical leave of absence. I had been warned earlier that spring by coworkers that I would be terminated as soon as I returned to work. Sure enough—Rockwell informed me that my job was no longer available and that my fate was in upper management's hands. In other words, I was fired. I was not the first employee to get fired for this reason. Others, such as Ray Sena, were fired for refusing to go along with contract mischarging schemes. Ray, too, took his allegations to the NASA inspector general's office in 1979, after receiving no action on his complaints from the corporate executives and company lawyers. He was fired by Rockwell after his approach to NASA. Other dismissals have occurred as well, which have effectively discouraged other potential whistleblowers that I know.

Mr. Chairman, I have always tried to be a patriotic man believing in my country. Yet, I feel in this situation my country is letting me, my fellow coworkers and taxpayers and fellow veterans down. There is absolutely no encouragement or incentive for someone working in the defense industry to report fraud and the submission of false claims to the Government. In my case I could not consciously work for a company stealing from the government in which I gave half of my body to. In fact, there is a disincentive because of the retaliation of the defense contractor employers who promptly fire or harass whistleblowing employees with almost complete impunity.

I am here to state that we desperately need S. 1562, the bill introduced by Senators Grassley, DeConcini, and Levin to amend the False Claims Act. If the amended act had been on the books, I could have filed a case on behalf of the Government to recover the fraudulently obtained money from the Treasury. I would have been

BEST COPY AVAILABLE

assured of some action and job protection. Once I filed the suit, I could not be fired, harrassed, demoted, threatened or suspended from my job without the company paying some penalty making it more costly and risky for them to embark on this course of action. Moreover, I could be sure that the Justice Department would look into the facts and evidence more earnestly. I presented and could make an informal decision whether to enter the case. The court would make sure that the case would be tried on its merits, and I would receive a financial benefit for my efforts from the proceeds of the settlement, if successful. Of course, the Treasury and taxpayers would benefit the most from the money received back into the Treasury, plus triple the damages.

This bill is needed to encourage employees like myself who know first-hand of fraudulent misconduct to step forward. Without this bill, these employees, the people in the best position to give such information, will be forced to remain silent—at the peril of risking their jobs, being blackballed from the industry, and finding no means of supporting a family or making a living, and to sit back and watch helplessly these acts of treason and rape against the people of the United States.

Senator GRASSLEY. Thank you very much. Anyone who is here would appreciate the healthy attitude you have. Particularly let me say to both of you that we appreciate the extent to which you are willing to fight against those things that you see wrong and to help correct the problem. I don't suppose we truly understand the suffering that you have gone through for being good patriotic Americans. This testimony will help us with that understanding. Hopefully some of the wrong will be righted some day.

I would like to ask both Mr. Wityczak and Mr. Gravitt—and, Mr. Helmer, since you are counsel for Mr. Gravitt, please feel free to comment—in the years you have spent working day in and day out do you feel the Government is adequately handling the Government fraud problem?

Mr. WITYCZAK. If I may take first shot at this, Mr. Chairman, now for example the Rockwell mischarge case, why if the budgets were overrun by $4.5 million did they settle it for $500,000. That comes out to one one-hundredth of 1 percent.

Senator GRASSLEY. Mr. Gravitt.

Mr. GRAVITT. If the Government were adequately handling the fraud problem, Mr. Helmer and I would not be getting reports that this started back during the Vietnam era with the J-79 engines, that it continued on through the SST program, the original B-1-B bomber program and of last report—they backed off a little bit when the FBI was in there.

My wife attended a union meeting yesterday and the major complaints from the union stewards to the committeemen were that the supervisors were telling the employees to falsify the vouchers. They've got all kinds of procedures.

Senator GRASSLEY. You are saying that a meeting yesterday would indicate that this is going on right now?

Mr. GRAVITT. Yes, sir, it was Sunday afternoon.

Senator GRASSLEY. This would be the position of the union being supportive of doing what is honest and not backing up.

BEST COPY AVAILABLE

Mr. GRAVITT. Yes, sir. The Air Force officials in-house at Evendale will not talk to the hourly and union members. They deal strictly with management.

Senator GRASSLEY. Would you say the opinion would be reflected by others workers in the plant as well

Mr. GRAVITT. Sir, when I was there, we didn't know what recourse to take. We didn't know who to trust. We didn't know who to go to. It was quite evident when I went up my chain of command everybody was involved in it.

Senator GRASSLEY. What about your coworkers?

Mr. GRAVITT. The coworkers that I had on my shift, some of them were stockholders and had seen this going on for many, many years, approached me and volunteered to sign proxies over to me for their stock so I could take the situation to the board of directors and hopefully they could stop what was going on.

Mr. WITYCZAK. Mr. Chairman, if I could take a whack at that, I feel all the Government contract employees are generally all for exposing fraud, but most of individuals just simply cannot and will not put their head on the chopping block jeopardizing their livelihood. They feel the Government just does not care. They've gotten that opinion due to the fact that the very, very mere pittance the Government has been able to collect from these defense contractors. The recoveries versus the crime–it is outraged us.

Senator GRASSLEY. What kind of a message do you think your cases have sent to your former coworkers and would-be whistleblowers?

Mr. WITYCZAK. I feel in my case, unless our Government backs us up as outlined in this bill S. 1562, we are at the mercy of the employers and you can anticipate a long, hard battle full of expenses and turmoil.

Senator GRASSLEY. I would like to have any of you comment on the Department of Justice's proposition as you have heard it explained today, just as best you can.

Mr. WITYCZAK. Just hearing the gentleman earlier, I feel that the Justice Department is sort of reluctant to have private citizens participate actively on this because that would put more pressure on them to make sure that it would end the whitewashing of these offenses, sir. That is my opinion.

Senator GRASSLEY. Mr. Gravitt.

Mr. GRAVITT. I would like to echo what Bobby says. It appears they don't want somebody doing their job for them, but it is quite evident from what we have seen thus far with the situation at General Electric somebody hasn't done their job for a long, long time. Other people that have talked to us on the telephones are of the opinion gosh, in R&D, you can't do something like that. Whenever they would try to bring it to the attention of different agencies—"GE doesn't do things like that" but it appears they do.

Senator GRASSLEY. I do have other questions, but I am going to have to submit them to you and ask you to return them to us in writing just as soon as you can. In fact, speed is important because we would like to move on this bill as quickly as we can. It is not because your testimony is not very important but because of time that I am going to have to dismiss you and thank you all very much for your participation.

BEST COPY AVAILABLE

56-657 O—86——4

Mr. WITYCZAK. Thank you very much, Mr. Chairman, and it has been a pleasure to have been here.

Senator GRASSLEY. Our next witness is Mr. John R. Phillips, codirector, Center for Law in the Public Interest. He is actively involved in assisting private whistleblowers in their efforts to expose fraud against the Government. He has spent considerable time in researching the False Claims Act.

Mr. Phillips, you may be a resident expert on the subject, considering the fact that very few people seem to know the False Claims Act exists, and the previous witness testified it was even in the banking area of the code.

Thank you for traveling all the way to be with us today. I would like you to proceed with a summary of your statement. We will print your entire statement in the record.

The reason I ask you to summarize is that I have some very important questions I want to ask you in person.

STATEMENT OF JOHN R. PHILLIPS, CODIRECTOR, THE CENTER FOR LAW IN THE PUBLIC INTEREST

Mr. PHILLIPS. Thank you, Mr. Chairman.

I know the time is late, and I will be as brief as I can be.

I am the codirector of a nonprofit charitable organization for the last 15 years. In southern California, we have so many defense contractors. It is obvious from the news accounts and yours and others efforts that there are defense overcharges. We have received various anonymous calls, typically from employees within the defense industry—and there are many thousands of those people in California—who are very troubled by what they have seen in the way of overcharge, and what some have been forced to participate in.

Based on our inquiry and investigation, it appears that conscious overcharging by defense contractors is massive, widespread, and institutional. To be accomplished it requires the participation of workers at all levels. You have heard a couple of them here today. They do not like to be drawn into this type of fraud against the Government but they have been. It is a conspiracy of silence among employees that has been maintained for too long. It is an attitude of looking the other way, do not rock the boat.

While these people would like to step forward and tell what they know, they understandably are most reluctant to do so. It takes a very courageous individual, such as the type we heard here today.

The process of overcharging the Government is very simple. There is no mystery to it. We have heard these descriptions today of defense contractors which have knowingly overcharged. The temptation to cheat the Government is overwhelming. And this temptation is yielded to every day by many of these defense contractors.

But what is the person who is a defense contractor employee who is forced to participate in this unlawful activity expected to do? He does not trust his Government to do something about it, and he knows, based on previous experience and examples, that he will probably lose his job, there is no protection today under existing Federal law for these employees who step forward and report illegal or questionable action taken by their employers. The Justice

BEST COPY AVAILABLE

Department officials did not know if any legal protection exists for some people. Let me tell you it does not exist. It is nowhere to be found in Federal law. Unless the change occurs at the most basic employee level where people who are unwilling participants in this fraudulent activity are given an opportunity to speak up and to take action to absolve their own conscience, nothing will change.

The False Claims Act had a laudable purpose. We have done an extensive amount of research on it, and have determined ways it can be improved. The fact that very few cases are brought is due to its obscurity, and some of the procedural limitations that now exist which deter people from actually taking an action against their employer.

First of all, and most obviously, there is no legal protection for people who blow the whistle on their employers. It is unbelievable to have to acknowledge that a person who, as a matter of conscience abides by the law and steps forward and says, "I know there is fraud being committed against this Government," it is unbelievable that he can be fired or harassed, as we heard here today, and have no remedy. That exists under the law today. Obviously, that should be changed. There can be no rational argument for the other side.

The question of whether you must base your complaint on new information not in the hands of the government at the time the complaint is filed, made a lot of sense. Nobody wanted a lot of parasitic lawsuits, merely piggybacking on the Government's efforts. That problem did appear briefly back in the 1930's. However, the language is so broad as to make it so discouraging for anybody to bring those actions today, which in turn so as to has resulted in the False Claims Act fulling into disuse.

The height of that absurdity is a case on the books decided 13 years ago, where a person saw massive fraud against the Government. This was the case of a contractor building a highway in Central America who went to the Justice Department, and exposed it. Nothing happened. He finally went to a lawyer, who filed a False Claims Act.

In the ninth circuit, that case was dismissed, because the Government had the information. Why did the Government have the information? Because he told the Government. That is an absurd decision and must be changed, in the way your amendment proposes. The law should invite people on behalf of the Government to file the action, and get the machinery of the Federal courts in motion. Once that machinery is in motion, there is no turning back. It gives an added incentive for people, as we heard here today, to do the right thing. The financial reward after a long successful effort, ought to be made available, but the current law guarantees nothing. It says they may receive something but they could receive nothing.

The procedural roadblocks also are very severe. The person should be permitted to participate in that lawsuit once filed, and not be forced out on the sidelines, simply because the Government decides to make an appearance. They may make an appearance, but that may be the last thing the Government does. Your amendments will alter that.

BEST COPY AVAILABLE

The advantage of this law is that it is self-executing. It does not add one more person to the Government payroll. It does not cost the taxpayers a dollar. It is self-policing. Everyone benefits—the Government, for what it obtains, the person benefits because he or she will have done the right thing, and the country and taxpayers are benefited because it is not fleeced. It is not working today. We need some dramatic changes. Those amendments will truly allow the False Claims Act to live up to its expectations.

Thank you.

[Statement follows:]

BEST COPY AVAILABLE

PREPARED STATEMENT OF JOHN PHILLIPS

I. INTRODUCTION

My name is John Phillips, and I am an attorney and co-director of the Center for Law in the Public Interest, a non-profit charitable organization based in Los Angeles that provides legal representation without charge to various unrepresented interests.

We first became interested in the False Claims Act several years ago when, after public disclosure of fraudulent overcharges within the defense industry, the Center received anonymous calls from employees of defense contractors who were aware of improper and illegal practices, but were not sure what they should do or where they should turn with this information. These potential "whistleblowers" did not believe they could go to the government -- they lacked confidence that anything would be done; nor could they go to the top officers of their employers for fear of retaliation. As a result of these calls the Center conducted research into the area of legal rights and remedies available to such people and discovered a little used 122-year old Act, the False Claims Act.

II. BRIEF BACKGROUND OF THE FALSE CLAIMS ACT

The original False Claims Act was passed in 1863 to combat the widespread fraud, corruption and misuse of federal funds that occurred during the Civil War. At that time, the F.B.I. did not exist and the U.S. Attorney General's staff was very small. The Department of Defense (then the War Department) lacked investigators to check on its various contractors and suppliers. Thus, the Government was largely dependent upon information received from private individuals concerning false claims or fraud against the Government.

The False Claims Act created civil liability for persons who made false claims against the federal government.

BEST COPY AVAILABLE

The Act provides that any person who knowingly makes false claims against the Government shall be subject to a $2,000 civil penalty and double the amount of damages sustained.

One portion of the Act, referred to as the qui tam section, was designed to encourage individuals to come forward and bring suit on behalf of the Government against the perpetrators of the fraud. In return for bringing suit, the person received half of the civil penalty, half of the damages, and all court costs.

Nonetheless, few private actions under the False Claims Act were brought prior to the 1940's, and the Act remained unchanged until 1943. In 1943, the Supreme Court ruled in United States ex rel. Marcus v. Hess that a private person could sue under the Federal Claims Act on behalf of the U.S. Government, even though the action was based solely on information acquired from the Government. Following that decision, numerous "parasitic" law suits were filed based solely on information they obtained from court indictments, newspaper stories, and congressional investigations, without providing any new information. While the literal wording of the Act permitted this type of action, it was obviously not consistent with the intent of the Act.

In the same year, in reaction to these suits, Congress amended the statute. The amended Act provides that the court shall dismiss an action brought by a person on discovering the action was "based on evidence or information the Government had when the action was brought." The qui tam plaintiff's recovery was also changed. Instead of receiving one-half of the recovery, the plaintiff was entitled to up to 10% of the recovery if the Government intervened in the suit. If the Government did not intervene in the suit, the plaintiff was entitled to up to 25% of the recovery.

BEST COPY AVAILABLE

III. BENEFITS OF THE EXISTING FALSE CLAIMS ACT

The False Claims Act is the best tool available to private citizens for attacking an important problem plaguing the nation today -- namely the millions of taxpayer dollars that are paid out to private corporations based on fraudulent claims made on government contracts. The purpose behind the enactment of the False Claims Act in 1863 -- to encourage individuals to aid the Government in ferreting out fraud against the Government -- is even more critical today, where the federal government is spending billions of dollars on federal contracts with private corporations in areas such as defense, aerospace, and construction. All one has to do is read the headlines to know mischarging practices are prevalent in the industry. The Justice Department does not have unlimited resources and should benefit from the additional non-governmental resources brought to bear to develop and pursue instances of false claims submitted to the government. Moreover, the critical element -- knowledge of such practice -- is uniquely in the possession of people within the industries which have government contracts. The False Claim Act encourages those people to reveal such information.

The False Claims Act benefits everyone: The government, because it recovers twice the amount of damages sustained because of the false claim; the person bringing the suit, because he can receive a substantial monetary award for doing his patriotic duty of exposing fraud against the government; and taxpayers, because they see that their dollars are not being wasted or misspent and know the Act deters fraudulent practices perpetrated by companies doing business with the Government.

A False Claims suit brought by an individual puts the machinery of the courts in motion to determine whether false claims have occurred. Once the suit is filed, the government cannot ignore the charges for political or administrative reasons, including lack of resources or low priority.

BEST COPY AVAILABLE

IV. DISADVANTAGES OF THE EXISTING FALSE CLAIMS ACT

Despite its wide application, the existing Act is not utilized by potential plaintiffs because it is flawed both substantively and procedurally, creating problems for both individuals and the U.S. Attorney's Office. First, the individuals who have the information of fraudulent practices are very reluctant to risk their jobs and livelihood to expose fraud without a guarantee of adequate protection. There are many risks and personal sacrifices involved in filing a False Claims Act suit, or testifying in such a suit. These risks include, first and foremost, being fired by an employer, being harassed or threatened by employers or co-workers, and if fired, being blackballed from within the industry in which they work.

These fears have a basis in fact, for "whistleblowers" have historically not been treated well within our system. They have divulged their information and then lost their jobs. Even if they were able to bring suit against their employer for a retaliatory firing, the cases might take years to prosecute and are a big drain on personal resources, without any guarantee of success.

In order for the False Claims Act to be truly effective in encouraging individuals to expose fraudulent claims against the Government, the Act must contain both employment and personal safeguards for those persons filing the suits or testifying in such suits. Moreover, the Act must contain strong measures to deter and punish an employer who violates the Act and retaliates against an employee for fulfilling his patriotic and ethical duty.

Another problem with the False Claims Act as presently written is that some provisions create harsh and unreasonable obstacles for both the individual plaintiff and the Government. These provisions effectively defeat the objectives of the Act and create disincentives for an individual to file suit. These obstacles include the following:

BEST COPY AVAILABLE

-- the opportunity for an individual's suit to be dismissed if the Government already has the information upon which the suit is based, even if the information is not being acted upon or analyzed in any way. This provision is unclear and courts have interpreted it differently. For example, a suit could be dismissed if the information was in unanalyzed storage files of disconnected government agencies.

-- the chance that an individual who files a case can be completely cut out of the suit if the U.S. Attorney enters the case, leaving the individual unable to ensure the case's effective and speedy prosecution on its merits;

-- the chance that an individual plaintiff will receive a small percentage (or even no percentage) of the recovery, due to the completely discretionary nature of the award and the fact that the person must pay the attorneys' fees out of the recovery amount awarded;

There is also a need to amend the Act to provide the Government with more flexibility in a case. The existing Act provides that once the U.S. Attorney's Office decides not to enter the case, the case is completely prosecuted by the individual filing the suit. What if new material information is uncovered which was not known by the Government when making its decision not to enter the case?

The proposed amendments to the False Claims Act contained in S.1562 would remedy these unintended disincentives in the Act and fulfill the true purpose of the Act -- to encourage people with knowledge of false claims to step forward.

V. EFFECT OF S.1562 AMENDMENTS

(A) Protection of Plaintiff and Witnesses

The existing False Claims Act does not provide any protection whatsoever for the person bringing a lawsuit on behalf

BEST COPY AVAILABLE

of the Government. After filing a suit, such person might be immediately fired by his employer, threatened or harassed by supervisors or co-workers, and blackballed from the industry in which he works. Thus, most individuals would be very reluctant to risk their jobs, their livelihood, and their personal security to expose either through filing a lawsuit or providing testimony the fraudulent practices of their employer or former employer in a False Claims Act suit.

The proposed amendment is <u>essential</u> to help alleviate the fears of a potential plaintiff or witness in a False Claims Act suit, and is reasonable and just given the many risks the plaintiff assumes in stepping forward. The effect of the proposed amendment is twofold: first, it will encourage a person to do his patriotic duty and expose a false claim with reduced fear of being left stranded without a job or personal security; and second, it will allow punishment - and hence deterrence - of an employer who engages in retaliatory action against such person.

The new provision carefully details examples of possible job discrimination outside of employee discharge, including threats, demotions, suspension, and harassment. The examples are given to deter the situation where an employee isn't fired outright, but is treated in an inferior manner by his company. The amendment also protects witnesses and those assisting in a False Claims Act investigation or lawsuit who might otherwise be afraid to testify on behalf of the prosecution.

The phrase "discriminated against... in whole or in part..." is included because an employer might offer another reason why the employee was fired, when in fact, the initiation or participation in a False Claims Act suit was an element in the employee's discharge.

The relief portion is designed to make the person whole again, whether that includes restitution with full seniority

BEST COPY AVAILABLE

rights, back pay with interest, or compensation for any special damages sustained as a result of the discrimination.

To resolve the problem of a potential plaintiff being unable to bring a suit because of prohibitive attorneys' fees, the provision provides litigation costs and reasonable attorneys' fees as part of the plaintiff's recovery.

The provision also provides stiff penalties against employers found guilty of retaliatory action. An employer is liable to the employee for twice the amount of back pay and special damages, and if warranted, is liable for punitive damages.

This new provision would go far in ending the "conspiracy of silence" which often surrounds a company and intimidates its employees into compromising their ethical standards.

(B) Government "Acting" on Information

The purpose behind the existing Section -- 3730 (4) was to eliminate the former practice of "parasitic" law suits. Back in the early 1940s, private individuals were filing False Claims suits based on information they obtained from court indictments and congressional investigations without providing any new information. In 1943, the section was amended to prevent this abuse by allowing the court to dismiss an action brought by a person on discovering the action was "based on evidence or information the Government had when the action was brought."

The serious problem with the existing language is that it places no responsibility on the Government to have developed the information or evidence in any way before the private citizen's suit is completely precluded. The evidence can just exist in a government file or within several disconnected government agencies without any analyses or connection being made for the suit to be dismissed.

BEST COPY AVAILABLE

The proposed amendment strikes a balance between closing the loopholes which lead to "parasitic" lawsuits and more reasonably and clearly defining what information or evidence is sufficient to warrant a case's dismissal by the court.

Under the proposed language, if a person bases a lawsuit on information or evidence that the Government has already disclosed in a prior administrative, civil, or criminal proceeding, the person's suit is to be dismissed. Moreover, if a person bases the lawsuit on specific information disseminated by any news media or disclosed during the course of a congressional investigation, the person's suit is to be dismissed. In this way, a person is foreclosed from merely "piggybacking" their lawsuit on to a prior or existing investigation into the facts alleged.

On the other hand, the U.S. Attorney's office would not be granted unlimited time to investigate the evidence or information disclosed. If the Government has not initiated a civil action within six months of becoming aware of such evidence, the court shall not dismiss the action brought by the person. If, however, the Government has been diligently pursuing the information but still has not had sufficient time to investigate the facts and bring a lawsuit, the Government can be granted additional time by the Court upon a showing of good cause. This time limit assures the person who carried the burden of initiating the action that if the lawsuit has merit, it will proceed, despite the Government's reluctance to act on its information for whatever reasons.

(C) Active Involvement of Plaintiff

The existing language of the Act (Section 3730 (3) and (4)) present a harsh, ineffective and self-defeating "all or nothing" proposition both for the person bringing the action and for the Government. If the Government proceeds with the action within the designated time limits, then according to existing

BEST COPY AVAILABLE

Section (3), the action is conducted only by the Government. Thus, the person who often faces substantial hardships and considerable personal risk in bringing the action is forced out of the suit entirely, unable to have any role to ensure that the case will be vigorously prosecuted.

The proposed language in Section (3) would allow the person who brought the action to continue in the action as a full party on the person's own behalf, even if the Government proceeds with the action. The government would have primary responsibility for prosecuting the case but the person would continue to have a direct stake in the outcome, ensuring that once the Government takes over in the case, the Government doesn't "sit" on the evidence, drag out the case, or let it drop for administrative or political reasons.

Since the person bringing the case often has risked their job and livelihood, if not his or her safety, in order to expose the fraud, it is only fair as a matter of public policy to allow the person to continue as a party to see that the case proceeds forward on its merits. Moreover, this furthers the primary purpose of the False Claims Act - to encourage private parties to expose fraud that they are otherwise discouraged from exposing. The Government, however, will not be bound by an act of the person bringing the action and will still be in the position of controlling the litigation.

(D) Guarantees of Monetary Awards

These provisions deal with the amount of recovery a person may receive for bringing a civil action under Section 3730. The amounts a court currently may award are quite undefined and discretionary.

In the existing Act, if the Government proceeds with the action, the person may receive "no more than 10 percent of the proceeds of the action or settling of a claim," if the Government does not proceed with an action, the person bringing

BEST COPY AVAILABLE

the action or settling the claim may receive no more than 25 percent of the proceeds of the action or settlement.

The problem with such an undefined and discretionary amount is that it discourages people from bringing a false claims action because there is no guarantee that they will be awarded anything even if there is a substantial recovery. There are many risks involved in bringing such an action. First, person must find the courage and the confidence to step forward and personally testify to the fraudulent practices of his employer, for example. This can immediately lead to being fired from the job, being blackballed from the industry, and being harassed and threatened by employers and co-workers.

In addition, court cases generally take a long time to try and are fraught with continuances and delay tactics on the part of the defendant. The person bringing the case will be forced to spend a tremendous amount of time on the case, and assuming he is fired, must find alternate sources of income to support a family and/or himself. Thus, the case becomes a substantial investment of time, money, energy, and emotion.

If a possible plaintiff reads the present statute and understands that in a successful case the court may arbitrarily decide to award only a tiny fraction of the proceeds (or nothing at all) of the action or settlement to the person bringing the action, the person may decide it is too risky to lose a job over a totally unpredictable recovery.

The proposed amendments take into account the risks and sacrifices of the plaintiff and offer minimum monetary incentives to induce individuals to step forward and expose fraudulent practices. If the Government proceeds with the action within 60 days of being notified, the person bringing the action shall receive between ten and twenty percent of the proceeds of the action or settlement of a claim, based on having brought the important information or evidence to the Government's attention.

BEST COPY AVAILABLE

The setting of such a range is sensible and can be looked upon as a "finders fee" which the person bringing the case should receive as of right. The Government will still be more than made whole receiving between 80 and 90 percent of the proceeds based on double damages -- substantially more than the zero percent it would have received had the person not brought the evidence of fraud to its attention.

Additionally, if the person bringing the action substantially contributes to the prosecution of the action, the person shall receive at least 20 percent of the proceeds of the action or settlement. This award can be looked upon as a "performance fee" based on contributions made in the litigation itself. The more substantial award encourages the person to contribute and participate in the suit through his lawyers in a positive, constructive way and to keep the pressure on the Government to effectively try the case.

Where the Government does not proceed with an action within 60 days of being notified, the person bringing the action or settling the claim shall receive an amount not less than 25 percent and no more than 30 percent of the proceeds of the action or settlement. In this case, the person is principally responsible for the lawsuit and should be well compensated based on having the primary role of prosecuting the case.

Another important change made in the existing provisions involves attorneys' fees awards. If the Government does not proceed with an action, under the existing Act, the person bringing the action may receive "reasonable expenses the court finds to have been necessarily incurred." No express reference is made, however, to attorneys' fees.

Assuming the case involves a defendant with substantial resources, the litigation will be hard fought, with the plaintiff facing a phalanx of well financed defendant's lawyers with motions, discovery disputes and continuances. In a case involving a $200,000 claim, for example, the attorneys' bills

BEST COPY AVAILABLE

alone (based on hours spent) in a case such as this could easily reach $100,000 or more. Since under the existing provisions, attorneys' fees are to be paid out of a person's recovery, it works as a disincentive for persons to bring a suit involving smaller cases of fraud, i.e., cases of 1/2 million or less. In almost all cases a plaintiff will have to offer the lawyer a percentage of the recovery available to the plaintiff. If there is a formidable array of lawyers on the other side, the plaintiffs' attorney could be required to spend enormous amounts of time for a relatively small financial reward. This would discourage attorneys from agreeing to take the case even though there may be strong evidence of fraud. Thus, reasonable attorney's fees, as defined by the courts, should be paid separately by the guilty defendant and is a fair apportionment of the cost incurred in disgourging the illegally obtained money. Under existing court procedures, these fees would be based on hours reasonably spent times a reasonable hourly rate.

In the proposed amendments, a person who contributes to the prosecution of the action along with the Government, or who prosecutes the action alone, may receive an amount for reasonable attorneys' fees and costs awarded against the defendant.

These proposed monetary awards will serve two main purposes: to provide a person with the incentive to bring a false claims case against a powerful defendant with substantial resources, and to adequately compensate the person for all the resources expended during the course of prosecuting the case.

(E) Government's Ability to Re-Enter the Case

The existing provision of Section 3730 (2) (A) also works an extremely unreasonable hardship on the government, for it bars the government from entering the case if it does not enter by the end of the 60-day period. What if new material evidence comes to light after that period which would have altered the government's initial decision not to enter the case?

BEST COPY AVAILABLE

The most reasonable solution is to allow the government in such a case to enter so it can bring its considerable resources to bear on the case. This is especially true in a complex case with a great deal at stake, where the resources of the defendant are tremendous and the person initiating the action on behalf of the government is almost inevitably put at a great disadvantage. It is thus in the interest of justice to ensure that the government may enter the case when it knows of new material evidence which will expose the fraud and substantiate the claims filed.

The proposed amendment solves this problem because the government now has a chance to enter in the case at a later date even if it did not proceed with the action within the 60-day period after being notified, if it can show the court that it now has new material evidence or information it did not have within the 60-day period after notice. The limitation as to situations where the government has "new" material evidence is to assure that the 60-day limit for the government's initial decision whether to enter the case is meaningful.

While allowing the government to enter so that it can play a significant role in the case, the language also ensures that the person who bore the burden of initiating the case and developing it into a strong one is not just pushed aside. The status and rights of the person are retained and protected so that the person remains a formal party to the action.

V. CONCLUSION

Adoption of S.1562 will make available a new and significant tool to combat a serious problem facing the nation today -- fraud against the government. It offers this potential without any additional costs or additional government personnel and does not create any new government enforcement bureaucracy. It will be self-executing and self-enforcing, calling upon its own citizens to join in the fight to protect the public fisc. And, it will provide a powerful disincentive to government contractors who have in the past forced their employees to either witness or participate in fraudulent and illegal schemes designed to overcharge the government. The only losers from this amendment will be those who cheat the government.

BEST COPY AVAILABLE

Senator GRASSLEY. Thank you very much.

I do have questions.

First of all, let me highlight again your leadership in this area. Your research has been very helpful. Particularly, you have come forth with changes in the legislation, which really is, in my judgment, going to change some of the institutional things within DOJ, which keeps prosecution from being carried out to the ultimate.

In DOJ's testimony, you heard that the qui tam provision was more useful at a time when the Government was lacking in law enforcement resources, unlike today, when the Government employs many thousands of Government investigators.

You also heard Mr. Stephens' assessment of how necessary or unnecessary the Department views these private citizens' suits.

What is your assessment of the need for a workable qui tam provision, in light of the Government's expansive resources today in 1985?

Mr. PHILLIPS. It is needed. The Government can use all the help it can get. It is not fair to assume we are adding a new cadre of lawyers who are going to be doing the Justice Department's job.

What this law will do, is create inducements and encouragement to the very people seeing the fraud going on day in and day out in these defense establishments. It will help the Justice Department ferret out the information.

Right now the people will not come forward, because they will lose their jobs. Obviously, people willing to bring that information directly to the attention of the Government, and the courts will see to it that more of this fraud is exposed. So I do not see what possible outside risk there would be to the Justice Department enlisting all these people out there who want to do the right thing, and having them come forward.

I disagree that this would in any way interfere with the Justice Department's capacity to go forward, and it unquestionably would augment them.

Senator GRASSLEY. As you know, S. 1562 could allow a private citizen to bring a false claims suit made public at least 6 months before the claim, before the Government showed good cause why it had. This is, in a way, a Department of Justice accountability session. DOJ calls this provision, in their words, difficult, and complains it would force it to be aware of all allegations of fraud when they become public knowledge.

I am having a difficult time figuring out what the problem is with forcing the Justice Department to become more aware of fraud allegations.

Do you see any possible difficulties in this area?

Mr. PHILLIPS. No, Mr. Chairman, I do not. I think the Justice Department would just like to be able to move the case at its own pace, without any effort being exerted upon them. That is precisely the value of this section. It keeps the pressure on. It says once fraud is disclosed to a court, it will move to a logical conclusion, to find out who is responsible for the fraud.

If you have a willing plaintiff, like Mr. Gravitt, to go forward and root out the fraud, and place the responsibility as to who is doing this within the company, unless that type of discovery is allowed to go forward and not stopped merely because the Govern-

BEST COPY AVAILABLE

ment has entered his case, we will see these cases languish. That is what has happened in the past.

Yes, it is an accountability procedure for the Justice Department, and I think it is appropriate that it be placed there.

Senator GRASSLEY. I guess, based on what you just said, I ought to ask what the real effects on the Department of Justice would be if this provision were in effect. I think your answer would be it would speed up some of their actions.

Mr. PHILLIPS. I certainly think it would. I think they should see this as a partnership, as an opportunity to work with many witnesses out there who are experiencing this fraud daily, and they should not see it somehow as a threat to their own prosecutorial activity.

I understand their reluctance to change the status quo. They like to run their own shop. They do not like anyone telling them they are not doing it fast enough, but the status quo needs to be changed. The evidence speaks for itself.

Senator GRASSLEY. It is a kind of us versus them attitude, but you are really saying that with stronger provisions of qui tam, it can be a partnership, with everybody trying to help get fraud under control?

Mr. PHILLIPS. Absolutely. It should be the duty of every citizen, and it should be the responsibility of the Government agency to support those citizens who choose to do so.

Senator GRASSLEY. Can I ask you to comment on DOJ's proposal as they presented it today?

Mr. PHILLIPS. One provision deserves comment, and that is the role of the qui tam plaintiff once it is filed. If the Justice Department makes an appearance in the case, that person who filed the case and has a great deal at stake is completely shunted to the sidelines, and has no formal role. Your provisions would give that person who has risked so much to step forward, an opportunity to participate in that litigation, to keep the movement going forward.

The Justice Department has objected to that, as I understand their testimony, and would like, as an alternative, to merely require that the person be kept informed of developments. That is nothing. That is the status of amicus curiae. You have no rights, and no opportunities to participate.

I think a better proposal would be to allow the person to actively participate. The person bringing the action is not trying to take the case away from the Government. It is the Government's responsibility to pursue, and as long as they pursue it, they are doing the right thing.

I think a better proposal would be to enable a person to go forward, take depositions, have interrogatories answered, as the attorney for Mr. Gravitt presented to General Electric, not allow it to remain on the shelf.

I think a better procedure would be to allow the discovery activity by the plaintiff to go forward unless it interferes in a demonstrable way with the Department of Justice's prosecution of the case. If discovery is going to interfere with the case, and they can demonstrate how it could interfere, then such discovery should not go forward. That is a fair way to present it to a judge.

BEST COPY AVAILABLE

No one is trying to oust the Government in this role, but we want to be sure the Government performs its obligations.

Senator GRASSLEY. I apologize for having to cut my questioning short. I also want to say you have contributed, both through your statement, and the answers, to a very good record.

We would still like four or five other questions to be submitted to you in writing.

Thank you.

I would apologize to our last witness, as well, for taking so much time in this hearing, but I think everybody realizes how important it is.

Our last witness is D. Wayne Silby. He is chairman of the Calvert Fund. He is speaking on behalf of the Business Executives for National Security, Inc.

I thank you for being here, Mr. Silby, and even though I know your colleague, I would ask that you introduce him for the record.

STATEMENT OF D. WAYNE SILBY, CHAIRMAN, THE CALVERT FUND, ON BEHALF OF THE BUSINESS EXECUTIVES FOR NATIONAL SECURITY, INC., ACCOMPANIED BY MIKE BURNS, DIRECTOR OF LEGISLATIVE LIAISON FOR BENS

Mr. SILBY. With me is Mike Burns, director of legislative liaison for BENS.

As the Senator just remarked, BENS is a national, nonpartisan trade association of 3,500 business executives and entrepreneurs favoring a strong, effective, affordable defense.

BENS lobbies Congress to adapt some of the lessons of successful businesses to our defense planning and spending. Among the issues we have worked on are increased competition in military procurement, independent testing, and evaluation of military equipment, and improved budgeting practices at DOD.

At the outset, I would like to stress that we are not lawyers, we are business executives. I think most of the discussions here today have been on legal aspects of the legislation. That is important. It is not our particular expertise.

We would like to offer, in brief, general terms, a business perspective on the issues the committee is weighing.

First, let me explain how we look at national security issues. BENS places the issues it lobbies on in three categories.

Integrity issues, quality assurance issues, and economical use of resources issues.

Integrity issues come first, because they are the most important. It is axiomatic that one cannot succeed in business while bearing the burden of a reputation for lack of integrity. Dishonest business practices poison commercial relationships, corrode morale in the affected businesses, and usually destroy the offending businesses.

Worse, such practices exact a terrible toll throughout the entire business community by tainting honest businesses with public perceptions of widespread business dishonesty.

Where the defense industry is concerned, dishonest practices have another major consequence: they deeply erode the consensus for necessary expenditures to support a strong, effective national defense.

BEST COPY AVAILABLE

The legislation being consider today is supportive of improved integrity in military contracting. The bill adds no new layers of bureaucracy, new regulations, or new Federal police powers. Instead, the bill takes the sensible approach of increasing the penalties for wrongdoing, and rewarding those private individuals who take significant personal risks to bring such wrongdoing to light.

This is a legislative approach that has been used before—having been developed during the Civil War—and has worked well. It permits the Government to enter into an investigation, or lawsuit, but does not force the Government's hand. It holds the promise of saving the taxpayers' billions of dollars, and imposing a new self-regulating discipline on wrongdoers in the defense industry.

Thus, the bill's real payoff may come in the form of a stronger and more affordable national defense.

I would ask that the balance of my remarks be placed in the record.

[Statement follows:]

BEST COPY AVAILABLE

Prepared Statement of D. Wayne Silby

Mr. Chairman, members of the subcommittee, thank you for asking Business Executives for National Security, Inc. (BENS) to present its views on S. 1562, amendments to the False Claims Act, also known as the Lincoln Law. I am Wayne Silby, Chairman of the Calvert Fund, a group of mutual funds based here in the Washington area. With me is Mike Burns, director of legislative liaison for BENS. Business Executives for National Security, Inc. (BENS) is a national, nonpartisan trade association of 3,500 business executives and entrepreneurs favoring a strong, effective, affordable defense. BENS lobbies Congress to adapt some of the lessons of successful businesses to our defense planning and spending. Among the issues we have worked on behalf of are increased competition in military procurement, independent testing and evaluation of military equipment, and improved budgeting practices at DoD. At the outset, I would like to stress that we are not lawyers; we are business executives. By now you have had an ample discussion of the legal subtleties of the legislation. It is important that such matters be discussed, but that is not our particular expertise. Today we would like to offer, in general terms, a business perspective on the issues the subcommittee is weighing.

First, let me explain how we look at national security issues. BENS places the issues it lobbies on in three categories: integrity issues, quality assurance issues, and economical use of resources issues.

Integrity issues come first because they are the most important. It is axiomatic that one cannot succeed in business while bearing the burden of a reputation for lack of integrity. Dishonest business practices poison commercial relationships, corrode morale in the affected businesses, and usually destroy the offending businesses. Worse, such practices exact a terrible toll throughout the entire business community by tainting honest businesses with public perceptions of widespread business dishonesty. Where the defense industry is concerned, dishonest practices have another major consequence: they deeply erode the consensus for necessary expenditures to support a strong, effective national defense.

In recent years, the sense of a major critical integrity problem in defense contracting has grown. Nine of the nation's top ten defense

BEST COPY AVAILABLE

contractors are under criminal investigation, as are 45 of the top 100. (For the subcommittee's convenience, I have attached to my testimony a list of these companies and the charges against them.) Something is clearly wrong with the incentives and disincentives in this industry. Part of the problem is the whole "central planning" economic approach at the Defense Department. Too many contracts and contract dollars are going out non-competitively, through an "old-boy network", and that breeds corruption. More competition would help a lot. But another part of the problem is a lack of fully effective sanctions against corrupt practices.

In promoting integrity as an important "basket" for national security issues, we have backed select legislative initiatives which we believe will effectively encourage honest business practices in defense contracting without at the same time causing undue governmental interference with the day-to-day operations of vast majority of businesses, which is to say honest businesses.

For example, we have backed the so-called "Revolving Door" legislation, which would establish a new condition of employment at DoD that personnel with significant defense contract responsibilities may not become employed by firms they have supervised for a set period of time. We believe that the appearance and reality of honest relations between DoD and the defense industry outweighs the minor inconvenience the legislation may cause to a handful of individuals.

The legislation before the subcommittee today is also beneficial. S.1562 avoids the kind of pitfalls that would make such legislation impossible for business to support. The bill adds no new layers of bureaucracy, new regulatons, or new federal police powers. Instead, the bill takes the sensible approach of increasing the penalties for wrongdoing and rewarding those private individuals who take significant personal risks to bring such wrongdoing to light. It is a legislative approach that has been used before - having been developed during the Civil War - and has worked well. It permits the government to enter into an investigation or lawsuit, but does not force the government's hand. It holds the promise of saving the taxpayers billions of dollars and imposing a new self-regulating discipline on wrongdoers in the defense industry. Thus, the bill's real payoff may come in the form of a stronger, but more affordable, national defense.

BEST COPY AVAILABLE

Our one reservation concerning the bill lies in the area of potential harrassment suits by a company's former employees.

We are persuaded that the expense of litigating such a case would deter most, and perhaps nearly all, frivolous or harassing lawsuits. Nevertheless, we would urge the subcommittee to buttress this protection by adding report language that urges judges to warn attorneys against bringing frivolous or harassing suits to trial under the Act. We would also recommend the inclusion of report language suggesting that any suit brought by a former employee of a company be promptly and carefully scrutinized by the courts for evidence of harassment.

I would conclude by noting again that we are a business organization, not a legal organization. No doubt today's testimony, and subsequent testimony will bring on further refinements in the language of S.1562 that would improve th bill. We would be happy to continue working with the subcommittee as the legislation moves forward.

Keeping in mind the suggestions regarding report language that I mentioned earlier, we are happy to support these amendments to the Lincoln law. We urge prompt passage of the legislation.

BEST COPY AVAILABLE

Defense Contractors Under Investigation

The following defense contractors were under criminal investigation by the Inspector General of the Defense Department as of May 1, according to a list made public by Rep. John D. Dingell (D-Mich.), Chairman of the House Energy and Commerce oversight and investigations subcommittee.

Contractor	Allegation
Allied Corp.	Conflict of interest
Avco Corp.	Subcontractor kickbacks Cost mischarging
Boeing Co., Inc.	Cost mischarging Supply accountability Labor mischarging
Congoleum Corp.	Mischarging Gratuities/theft
Dynalectron Corp.	Cost mischarging
Eaton Corp.	Conflict of interest-gratuities Cost mischarging
Emerson Electric Co.	Cost mischarging Gratuities-cost mischarging
Fairchild Industries, Inc.	Gratuities Product substitution Cost mischarging False statements
Ford Motor Co.	Defective pricing-labor mischarging Falsification of performance records
General Dynamics Corp.	Cost mischarging Subcontractor kickbacks Labor mischarging Product substitution Security compromise Defective pricing Cost duplication False claims
General Electric Co.	False claims Defective pricing Labor cost mischarging Product substitution
Gould, Inc.	Cost mischarging
Grumman Corp.	Cost mischarging
GTE Corp.	Unauthorized acquisition and utilization of classified data
Harris Corp.	Defective pricing
Honeywell, Inc.	Diversion of government property Bid rigging
Johns Hopkins University	Civilian health and medical program of the uniformed services fraud
Lear Siegler, Inc.	Product substitution
Litton Industries, Inc.	Bribery-subcontractor kickbacks Mischarging False claims Bid rigging Cost mischarging
Lockheed Corp.	Labor mischarging
Martin Marietta Corp.	Subcontractor kickbacks Cost mischarging
McDonnell Douglas Corp.	Cost mischarging
Motorola, Inc.	Labor mischarging
Northrop Corp.	Labor mischarging False progress payments
Raytheon Co.	Labor mischarging Product substitution
Rockwell International Corp.	Cost and labor mischarging
Sanders Associates, Inc.	Unauthorized release of contract information
Sperry Corp.	Labor mischarging Cost mischarging Defective pricing
Tenneco, Inc.	Cost mischarging
Texas Instruments	Product substitution
Textron, Inc.	Cost mischarging
Todd Shipyard Corp.	Noncompliance with contract
Tracor, Inc.	Product substitution
TRW, Inc.	Defective pricing Cost mischarging
United Technologies Corp.	Gratuities Subcontractor kickback Cost mischarging Bribery Defective pricing
Westinghouse Electric Corp.	Cost mischarging

BEST COPY AVAILABLE

Mr. SILBY. In summary, I think the bill encourages integrity in the marketplace, without increasing the bureaucratic burden, and provides an enforcement function using market incentives. It will eventually contribute to the popular perception of national security business as being above board. Thank you.

Senator GRASSLEY. Thank you very much. I want to thank you as a member of the organization. I had an opportunity to thank many of your people here, who work in Washington. We appreciate the many areas that you have worked on with us such as changing the status quo within the defense procedures as well as within the budget. It has been very useful having people out there in the business world, who know what it is to have to show a profit to stay in business.

Mr. SILBY. Senator, we business executives are very busy. When I think about doing some public interest work, though, the whole issue of military spending is one thing important to me, above everything else.

Being in the investment business and managing a couple of billion dollars, I must say my own self interest is to want good investment opportunity to exist. The kind of spending the military sector is doing today creates economic problems.

Senator GRASSLEY. I have just one more question, and I will ask you to respond to writing to other questions.

You heard testimony from earlier witnesses that one comes away from the Department of Justice with the impression that justice is not being administered justly because the Department of Justice has no incentive to do so. In fact, there may be some insensitivity in doing so.

Since you are a businessman, and you must certainly know how to use and manipulate incentives, would you provide us some insight as to how a favorable system of incentives can be brought to bear on the Justice Department?

Mr. SILBY. Looking at it from the Justice Department's point of view, obviously, they would like to run their own shop. Like them, we business people like to run our own shops, but we are part of a larger world and we need to respond to external actions. We need to be responsive, and sometimes we need help in a broader context through regulation, through regulatory groups to conform some of our practices to those which are in the larger public interest.

Yes, Government incentives and disincentives may make some problems for us. We never favored Government regulation in business. At the same time, I think the incentives you are looking about will help bring about a partnership under regulation. I think the overall result is really what we want to focus on, and those results can only be positive.

Senator GRASSLEY. Mr. Burns, would you have anything you would like to add?

Mr. BURNS. Yes; I would like to observe that businesses just love to have monopolies. The only people who do not want a monopoly are the people outside looking in. But monopolies are very dangerous things, and we restrict them legally.

With this legislation, what we would be doing in a very subtle and succinct way is removing the monopoly the Department of Justice has in these kinds of cases. It will provide an ingredient that

BEST COPY AVAILABLE

we all enjoy the benefits of which is competition. It most certainly will be useful in the production of justice.

Senator GRASSLEY. Thank you very much.

As I indicated to you, we have several questions we would like you to respond to in writing. That is because of the time. I want to apologize.

Mr. BURNS. No apology is necessary.

Senator GRASSLEY. Particularly since you were so patient in waiting on the last panel.

I notice that none of the witnesses from the Justice Department are still here. In fact, the witnesses left right afterwards. If there are people still here from Justice, hopefully they will take a message back that all of this testimony, I think, indicates that the Department of Justice could use some help, and that things are not quite the way their witnesses suggested that they are. Something more dramatic needs to be done than what is being suggested by the Justice Department in their testimony or public consumption at yesterday's news conference.

Mr. Stephens, who testified for the Department of Justice, is an Iowan. His father served with me in the legislature so I know from whence he comes, and he knows that Iowans are generally open people.

I would like to say in the fashion that we Iowans do business, that Justice Department premises its position and activity on an erroneous assumption that the current status of law enforcement handled by just the Government is adequate and that justice is adequately taking care of the fraud problems. I think if they had stayed here, they would see that there are problems that they need help with.

However, a preponderance of today's testimony not only could contradict DOJ's assumptions but also suggest that the Justice Department is removed from what is occurring out there in the real world.

While conscientious citizens around the world are fighting for their lives, our Department of Justice is up here on Capitol Hill telling the public and Congress that everything is just hunky-dory. In fact, the only people who think that the Justice Department is doing a good job are those people right there in the Justice Department. The rest of the world rightly perceives their activities as a comedy of errors.

It is understandable then that the Department of Justice's response during yesterday's news conference about the legislation failed to adequately address real problems out there in the real world and, of course, that figures because an erroneous premise will always yield an erroneous response.

The status of the current law is not the real problem nor is fixing it the real cure. The real problem is Justice Department's failure to find out what is happening beyond its own walls thereby being unable to respond to the current fraud theme. Any real cure must begin with much reflection and much more humility than Government institutions generally exhibit.

It is undeniable that institutions such as the Department of Justice, even the Congress of the United States and, of course, the Defense Department are often guided by interests that are at odds

BEST COPY AVAILABLE

with the interests of the taxpaying public. In such an environment, the justice is administered selectively.

The primary means for doing so is called prosecutorial discretion. At times, the only effective counter to such a well-entrenched interest is the collective exercising by the Nation's citizens of their conscience and their judicial rights. Private citizen involvement in uncovering fraud against Government would render prosecutorial discretion to be much more accountable and would be a desirable discipline on the enforcement process.

The public is demanding sufficient Government action against fraud, and it will tolerate nothing less. It is perhaps advisable for the Justice Department to do a bit of soul searching and return to the drawing board for a more appropriate and deserving response to what we have demonstrated is happening in Cincinnati, OH.

In the meantime, the Congress intends to move ahead with much needed reform so that the thousands of frustrated litigants fighting the system will have some degree of hope to continue pursuing true justice.

The meeting is adjourned.

[Whereupon, at 12:40 p.m., the committee adjourned, subject to the call of the Chair.]

BEST COPY AVAILABLE

APPENDIX

STATEMENT OF SENATOR HOWELL HEFLIN
S. 1562, THE FALSE CLAIMS REFORM ACT OF 1985
SEPTEMBER 17, 1985

MR. CHAIRMAN:

I COMMEND YOU FOR YOUR FINE RECORD OF ACTION IN BRINGING TO THE CONGRESS' AND THE NATION'S ATTENTION THE INEXCUSABLE WASTE OF TAXPAYER DOLLARS THROUGH FRAUD AND ABUSE IN THE DEFENSE DEPARTMENT AND OTHER AGENCIES. TODAY THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE CONSIDERS LEGISLATION TO PUT TEETH INTO THE LAWS PROHIBITING PRIVATE COMPANIES FROM SUBMITTING FALSE AND EXAGGERATED CLAIMS TO THE GOVERNMENT FOR SERVICES RENDERED, OR NOT RENDERED, AS THE CASE MAY BE.

A GREAT MANY CONTRACTORS, IN RECENT MONTHS, HAVE BEEN EXPOSED AS CHEATING OUR TAXPAYERS. WE NEED TO SHOW THESE COMPANIES THAT THE UNITED STATES CONGRESS IS NOT WILLING TO ALLOW THESE CONTRACTORS A MOMENTARY SCARE AND THEN TO GO BACK TO BUSINESS AS USUAL. IT IS CONGRESS' RESPONSIBILITY TO ENSURE THAT THOSE ENTRUSTED WITH BRINGING THE ABUSERS OF OUR AMERICAN SYSTEM TO JUSTICE HAVE A STIFF SET OF PENALTIES ON THE BOOKS TO BACK THEM UP. THE ENORMOUS PROFITS OF TODAY REQUIRE PENALTIES THAT WILL MAKE THESE PROFITEERS THINK TWICE BEFORE CHEATING THE AMERICAN TAXPAYER BY CHARGING HIM WITH A CORPORATE EXECUTIVE'S DOG BOARDING EXPENSES OR THE PRICE OF A KING-SIZE BED. THESE AND OTHER ABSURD CLAIMS SHOULD BE SEVERELY AND SWIFTLY PUNISHED.

BEST COPY AVAILABLE

THE LEGISLATION NOW ON THE BOOKS TO PUNISH FRAUDULENT CLAIMS DATES BACK TO 1863, WHEN ABRAHAM LINCOLN BECAME CONCERNED ABOUT THE DANGER OF GOVERNMENT CONTRACTOR PROFITEERING DURING THE CIVIL WAR. THE HORROR STORIES FROM THAT ERA HAVE A FAMILIAR RING TO THEM, SUCH AS RESELLING HORSES TO THE CAVALRY TWO AND THREE TIMES AND SELLING BOXES OF SAWDUST TO THE MILITARY INSTEAD OF MUSKETS.

THE FALSE CLAIMS ACT WAS ORIGINALLY ENACTED TO ENCOURAGE INDIVIDUALS TO REPORT GOVERNMENT FRAUD, AND IS NEEDED JUST AS DESPERATELY IN 1985, WHEN HUNDREDS OF BILLIONS OF DOLLARS ARE SPENT ON WEAPONRY AND CONSTRUCTION NOT DREAMED OF IN 1863.

SENATOR GRASSLEY'S AMENDMENT TO THE FALSE CLAIMS ACT WILL ENHANCE ENFORCEMENT IN SEVERAL WAYS. THE CIVIL FORFEITURE AMOUNT WOULD BE RAISED FROM THE ORIGINAL 1863 AMOUNT OF $2,000 TO $10,000. DAMAGES PAYABLE TO THE GOVERNMENT WOULD BE INCREASED FROM DOUBLE TO TREBLE, AND CRIMINAL PENALTIES WOULD BE RAISED TO $1 MILLION, AMONG OTHER PROVISIONS.

I UNDERSTAND THAT THE REAGAN ADMINISTRATION HAS ALSO PROPOSED A PLAN TO COMBAT CONTRACTOR FRAUD WITH SOME OF THE SAME PROVISIONS AS THE BILL THE SUBCOMMITTEE IS CONSIDERING TODAY.

I LOOK FORWARD TO REVIEWING THE MERITS OF BOTH OF THESE BILLS AS WE CONTINUE OUR WAR ON WASTE, FRAUD AND ABUSE IN THE GOVERNMENT.

THANK YOU, MR. CHAIRMAN.

○

BEST COPY AVAILABLE